









THE  
LAW MAGAZINE

AND

LAW REVIEW;

OR,

*Quarterly Journal of Jurisprudence.*

AUGUST, 1869, TO FEBRUARY, 1870.

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VOLUME XXVIII.

LONDON :

BUTTERWORTHS, 7, FLEET STREET,

*Printed by Publishers to the Queen's Most Excellent Majesty.*

EDINBURGH: T. & T. CLARK, AND BELL & BRADFUTE.

DUBLIN: HODGES, SMITH, & CO.

MELBOURNE: GEORGE ROBERTSON.

CAPE TOWN: SAUL, SOLOMON, & CO.

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1870.

LONDON

PRINTED BY W. W. HEAD, VICTORIA PRESS, 11, 12, & 13, HART ALLEY,  
FARRINGDON STREET, E.C.



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OF THE  
*Law Magazine and Law Review.*

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THE  
Law Magazine and Law Review :

OR

QUARTERLY JOURNAL OF JURISPRUDENCE.

*Vol. XXVIII*

No. LVI.

ART I.—LIFE ASSURANCE.

HITHERTO the Legislature has given itself little concern with the contract of life assurance, though it is one distinguished from other contracts in several important particulars. The fulfilment of it on the part of the assurers is postponed to an indefinite period, and depends on strict conditions of punctuality of payment, &c., on the part of the assured; it cannot be put an end to earlier without loss to him, and gain to them; and, when the sum assured comes to be payable, the persons liable may, by transfer or by mere succession, have come to be a very different body from those with whom he originally contracted. It seems but reasonable, therefore, that the assured should have some special legislative protection. We propose to set forth succinctly the provisions relating to life assurance that are to be found in the Statute Book, and to suggest principles for future legislation, which will probably now not long be deferred.

The earliest Statute affecting life assurance is the 14 Geo. III. c. 48 (1774), which has obtained the sobriquet

of the "Gambling Act." It recites that it has been found by experience that the making assurances on lives, or other events, wherein the assured hath no interest, had introduced a mischievous kind of gaming; and it enacts that no insurance shall be made on an event in which the party insured hath no interest, and that in all policies the name of the party interested shall be inserted, and nothing more shall be recovered than the amount of his interest. This Act was directed against an abuse then prevalent: but it is scarcely too much to say that, in modern times, it has never availed to prevent an illegitimate transaction, and has never been put in force except to evade a just claim.

This Act has been mischievous, also, in the colour which it has given for the early and mistaken decisions of the judges that life assurance is a contract of indemnity. This doctrine, though contrary to common sense, held sway until 1855.

Up to 1844 the Statute Book is silent as to the persons who might enter into contracts of assurance, usually called "policies," *i.e.* promises. They might be made between individuals (*March v. Pigot*)\* or granted by chartered companies, or by partnerships. Such partnerships as existed before November 1, 1844, for carrying on the business of life assurance, have never been subjected to any regulations as to publicity, or registration, or rendering of accounts.

By the Joint Stock Companies' Act of 1844 (7 & 8 Vict. c. 110) it was enacted that all associations for assurance of life, whether "proprietary," or "mutual," established after its passing, should come within its provisions. They were required to deposit with the Registrar of Joint Stock Companies a copy of their Deeds of Settlement, and to return to his office every year an audited balance-sheet.

\* Burrow, 2803.

These documents were to be open to the inspection of any person, on payment of one shilling.

The effect of this Act was precisely the reverse of what might have been expected, and what its framers certainly hoped for. Previously to 1844 it had been difficult to start an assurance company, except in obedience to some genuine public demand. The passing of this Act brought into existence the trade of "company-promoter," which became so profitable that assurance companies were registered by scores. The mere fact that a Government office was open to receive documents lulled to sleep all suspicion in the public mind as to what those documents might disclose.

The balance-sheets were returned in due course to the Registrar, and published in official blue books, besides being reprinted, both in full and in abstract, by earnest and intelligent volunteers. Many of them were so sent in, that no sufficient information could be obtained from them, items being grouped together in such a manner as to conceal the facts which it was important to know. This, of itself, should have excited suspicion.

The returns, insufficient as they were, did establish beyond a doubt two facts:—first, that most of these companies were squandering in expenses of management far more than a proper proportion of the premiums they received; second, that few indeed of them cared anything about accumulating the reserve necessary to meet the claims that must come upon them in the future. Yet the knowledge of these things had no effect in bringing the sinning concerns to a stand; those already assured could not withdraw, and even new policy-holders were obtained through highly-paid agents and canvassers. When the time came that an actuarial valuation refused to produce any "bonus," then "amalgamation" was resorted to.

This mischievous state of things was not without its effect on the older companies, many of whom found it necessary



to compete with their rivals, by offering the same high commissions for introduction of business, &c. "Bonuses" to the assured were found to be so attractive that, in order to be able to advertise the declaration of "a handsome bonus," companies not unfrequently pledged a great portion of their future profits. The business of making provision for families was carried on with eyes deliberately shut to the future.

The next Statute to be quoted affects life assurance beneficially. By the Income Tax Act, 16 & 17 Vict. c. 34, s. 54, any person who makes insurance on his life, or the life of his wife, is entitled to deduct the amount of annual premium paid by him from the amount for which he is liable to be assessed, but not to a greater extent than one-sixth part of his whole assessment. At the time this Act was passing, one of the many abortive attempts to reduce the whole business of life assurance to a regulated system was in progress. The insurances under which exemption was to be claimable were only such as should be effected "with any Insurance Company registered under any Act, to be passed in the then present session of Parliament for that purpose, and complying with the requirements of such Act." No such Act, however, became law, and it was necessary, by a subsequent Act (c. 91 of the same session), to define the assurance companies, whose policies entitled the holders to abatement, to be "all existing in 1844, or registered under the Joint Stock Companies' Act of that year."

The principle of the Joint Stock Acts continued to prevail till the Act of 1862 omitted all clauses requiring the depositing of annual accounts with the Registrar. The principle of this Act is that the public are entitled to know—first, with whom they are dealing; second, the conditions under which their contracts are entered into. Accordingly, the Articles of Association are required to be printed and registered, and an annual return is required to be made of

the shareholders and the changes in their body. The financial condition of the concern is treated as a domestic matter merely.

Assurance companies and banks, however, under the Companies' Act, 1862 (s. 44), are required twice a year to prepare, and to keep suspended in their registered offices, a statement of the capital of the company, the number of shares issued, and the amount paid thereon, and an abstract of the liabilities and assets. The abstract of assets is of the most meagre character possible; everything that is not in Government securities, bills of exchange, or cash, being required to be grouped under the title "other securities." By ss. 209, 210, every insurance company registered under the Joint Stock Companies' Acts (that is, every company established since 1844) was required to register under the Companies' Act.

The only remaining Statute affecting the commerce of life assurance is the 30 & 31 Vict. c. 144, "The Policies of Assurance Act, 1867." This was passed to remedy the defect in the law by which (a policy of assurance being a *chose in action*) the assignee was unable to sue for the amount assured without using the name of the assured person. This Act (as Mr. Bunyon\* points out) does not make policies assignable at law in direct terms, but it provides that any person possessing an equitable right may sue in his own name.

We have given this brief summary of the existing Statute Law relating to Life Assurance and Insurance Companies, as introductory to the inquiry—how it should be amended? With this purpose one Bill was introduced in 1867 into the House of Commons, by Mr. G. Shaw Lefevre, now Secretary to the Board of Trade; and another in 1869 by the Right Hon. Stephen Cave. The first had for object a beneficial extension of the advantages of life assurance; the second the regulation of dealings between the companies

\* "Law of Life Assurance." 2nd. Edit., 1868. Laytons, 150, Fleet Street, London.

and the public. It will be convenient to take first into consideration the latter measure.

Mr. Cave's Bill\* proposed to require more extensive returns than formerly of the funds and liabilities of assurance societies. A very good form of return was provided. It is evident that the information those who deal with an insurance company require is:—

- (1.) A statement of the actual securities upon which the funds are invested, with the amount of interest annually produced.
- (2.) Particulars of all the liabilities of the society.
- (3.) Information as to the law of mortality and rate of interest adopted in making the actuarial valuation.

Mr. Cave's Bill is very well devised for obtaining these particulars; and, if it were enforced, and the results studied by the public, they would pretty clearly understand the position of each company.

The knowledge of the actual position of a company, however, even supposing it to be obtained, is but one element in the question. Under the present system of life assurance the policy-holder has no choice but to keep up his policy, whatever the position of the company may be. If he drops it he loses all he has paid, and for the company to consent to give him full value for it would be unfair to those who remain. It is a fallacy to suppose that an assurance policy can possess a "guaranteed surrender value," equivalent to the unliquidated risk. The company must have the right to charge something for the selection exercised against it.

Once insured in a company, the knowledge that it is on the road to insolvency is of little value unless accompanied by the power to stop its progress thither. If the company is a proprietary one, the policy-holders cannot possess such a power. Even in a mutual society, they are likely to be

\* Bill 36, 1869. H.C.

deterred from exercising it by arguments which are presented to them in the light of prudential considerations. It is not for them to do anything which would check the inflow of new assurers to share the risks with them.

The mistake, which lies at the bottom of the whole mischief, which renders the Legislature practically powerless, and those concerned wilfully blind, is that life assurance has been treated from the very first as a matter of speculative business. When, in 1720, the Government of the day accepted 60,000*l.* from the merchants of London as the consideration money for Royal Charters to the London Assurance Corporation, and Royal Exchange Assurance Corporation, they acted on this principle. It was, of course, supposed that by carrying on the business of assurance, the subscribers would make profits that would amply repay them for this gift to the public treasury.

So, when companies in the present day advertise the high price at which their shares are saleable, or the large bonuses they have added to their policies, they deal with life assurance as a matter of trade. And when commissions are offered to introducers of "business," when the faulty condition of a company is glossed over lest new members should not join it, or when a price is demanded for the "goodwill" of a company selling its "business," the same principle is being acted upon—only in a more ruinous direction. In too many cases the one form of error has led to the other, and companies have thrown away funds, that ought to have been husbanded to meet their risks, in efforts to obtain such a show of "new business" as would appear to justify the declaration of large bonuses.

Policy-holders should understand that the contract of life assurance is one from which every element of uncertainty ought to be removed. The distinction between "profit" and "non-profit" policies ought to be done away—the premium should be the exact equivalent of the risk, without margin for commission, or profit, or anything but the

necessary expenses. There would still be liability to fluctuation, for "laws of mortality" are not laws of nature, but nothing more.

Attempts to make profit by getting high interest for the money invested should be discouraged. High interest always means bad security, and assurance companies should be as strictly limited to investments in the best class of securities as trustees are. In point of fact, the monies received should be looked upon as trust monies.

If, instead of being managed as a business by proprietary companies desirous to make profits for their shareholders, or by mutual societies desirous to make profits for their participating policy-holders, life assurances were only granted by Boards of Trustees with limited powers of investment, and no speculative interest in the matter, two results would follow :—

- (1.) No such Board would be formed except in obedience to a genuine public demand, and of men possessing public confidence.
- (2.) Vast numbers would prefer to have the Government as their trustee, if it were willing to accept the trust.

By the 16 & 17 Vict. c. 45 (1853), the National Debt Commissioners were empowered to grant policies of assurance to persons who purchased from them at the same time deferred annuities. As these are the very persons to whom a policy of assurance could be of no service, no policies were ever granted under this Act. But in 1864 (by the 27 & 28 Vict. c. 43) the Government Life Assurance Department, now worked through the Post Office, was established, and has had a measure of success.

This Act fixes the limit of the amount for which the Government will grant an assurance at not less than 20*l.*, nor more than 100*l.* The first limit is too high, the second too low. Indeed, there is no reason why there should be any limit at all.

The main object which Mr. Gladstone, who brought in the Bill, declared he had in view, was to afford to the working classes a means of assurance which should be safer than their friendly and burial societies. Few of such societies, however, grant assurances as high as 20*l.*; 5*l.* or 10*l.* is as much as the average of their members require.

The French Government has avoided this error in the life assurance department, recently instituted in France under State guarantee. There is no minimum limit of assurance, but the maximum is fixed at 120*l.*\* The Government moreover, issues collective guarantees to the friendly societies themselves.

If all limits on Government assurance were removed, the present system of offering small assurances to the working classes, without much reliance upon medical examination, might be continued; while, with respect to the larger policies, these would of course only be granted in accordance with the recommendation of the medical men consulted. The Government has always available the best medical skill, and the time might not be far distant when a sufficient number of lives would be assured through this means to enable the system to be carried to the fullest extent of its beneficent powers, so that no life whatever should be deemed absolutely uninsurable, but every man be admitted to the benefits of life assurance at a price corresponding to the actual state of his health.

Whether an extension of life assurance in this direction be practicable or not, the result of the establishment of a Government office for general life assurance would probably be that it would be thought as absurd to set up a new speculative assurance office as it now is to establish a new voluntary savings' bank. The history of savings' banks, since the foundation of the Post Office Savings Bank, would, in fact, be repeated with regard to life assurance companies.

Report of the Registrar of Friendly Societies in England for 1868, p. 72

Many of those which are now in a sound condition might continue to exist side by side with the Government office, the remainder would gradually seek absorption in it. For many years, perhaps, old associations and the slow growth of new ideas would continue to carry people to the assurance companies, but the other system would be steadily growing in the meanwhile.

The whole force of this argument depends on the principle that life assurance is not a trade but a trust. If it is a trade, nothing could be more pernicious than for the Government to undertake it; if it is understood to be a trust, no private body could execute it equally well. We have no doubt the latter view will, in the end, secure general assent.

While assurance companies continue to exist, however, provision for their future regulation will have to be made; and though we have little faith in the efficacy of returns, yet those set forth in Mr. Cave's Bill it will be desirable to obtain. It contained also a clause with respect to amalgamations. This branch of the question requires some consideration.

When a company becomes unsound the best, almost the only, remedy is immediate amalgamation, before its affairs fall into a worse condition. By this means only can its expenditure be sensibly diminished, its average of risks increased, and its policy-holders obtain better security. If, however, the amalgamation is so managed as to increase rather than diminish the expenditure, if the union takes place without a proper estimate of the risks on both sides, and the setting aside a sufficient amount to meet them; then it must, sooner or later, lead to the bankruptcy of both companies.

We here use the word "amalgamation" in its popular application. In the strict sense of the term an amalgamation of two companies can rarely, if ever, take place. The transaction is really a transfer of the policies and



assets of the one company to the other, in consideration of a payment in cash, or an allotment of shares, to the proprietors of the transferring company.

In companies under the Act of 1862, sections 161 and 162 regulate these transactions, and make them binding on all concerned, unless an order be made for winding-up by the Court within twelve months from the resolution for selling the "business," and the Court then refuses its sanction. The partnerships which existed before 1844 are excluded from the benefits of this provision; and a recent decision (*In re Family Endowment Society*\*) has subjected them to the provisions of Part VIII. of the Companies' Act, relating to unregistered companies. While this decision is subject to appeal, it would be improper to comment upon it, but it may be remarked that it seems an extreme application of these clauses in the Act of 1862, to bring within their operation a partnership, the transfer, or supposed transfer, of the business of which took place in 1861. As to the clauses themselves, the policy of the Legislature in making a mere partnership a company for the purpose of winding-up, and for that purpose only, is open to grave doubt.

Mr. Cave's Bill proposed to enact that in all cases of amalgamation or transfer, copies of the agreement for the purpose, the actuarial reports, and lists of all payments to be made, shall be deposited with the Registrar of Joint Stock Companies within ten days from the date of the "completion" of the amalgamation or transfer. If this be amended to, or defined to mean, the date of the resolution passed by the transferring company, then the provision of the Companies Act, which allows the Court to intervene within one year, ought to answer the purpose of protecting the assured against transfers injurious to their interests, as well as that of protecting shareholders against the

\* Weekly Notes, Nov. 27, 1869, p. 239.



revival, many years afterwards, of a liability they supposed to have been utterly extinguished. The assured would, at least, have the power of so protecting themselves, if they cared to exercise it.

On the whole, therefore, though Mr. Cave's Bill provided only for the registration of certain documents, and was thus merely an extended application of the principle which, under the Act of 1844, had already been found to fail; yet, coupled with the spread of better practical information about life assurance, and the lesson which policy-holders have learned of the risks they are incurring, it would be as effective in keeping those assurance companies which may survive in the safe path as mere legislation can possibly be.

On most questions of efficient administrative control, the practice of the French is worth studying. By a Government regulation of January 22, 1868, assurance societies in France are subjected to the following provisions :—

1. The capital paid up must not be less than 2000*l.*, even where the subscribed capital is less than 8000*l.*

2. The shares cannot be made transferable to bearer, until a reserve fund has been accumulated, equal to the uncalled capital.

3. Twenty per cent. of the net profits is to be carried to the reserve fund till it amounts to one-fifth of the whole capital.

4. The funds, less the necessary expenses, must be invested in real property, Government stock, Treasury bonds, or other securities created or guaranteed by the State, shares of the Bank of France, departmental or communal bonds, debentures of the *Crédit Foncier* or of railways having a minimum interest guaranteed by the State.

5. Every policy must contain a statement of:—

- (1.) The subscribed capital.

- (2.) The amount paid up; and whether shares have been made transferable to bearer.
- (3.) The maximum held on any one risk, without reinsurance.
- (4.) The other kinds of insurance, if any, granted by the society, and the amount of capital applicable to them.

6. Every policy-holder, or any person authorised by him, is entitled at any time to examine the last balance-sheet, either at the head office of the society or at any of its agencies. He may also require a certified copy of the same on payment of a sum not exceeding one franc.

The measure we have referred to as introduced by Mr. Shaw Lefevre, in 1867, bore the title of the "Life Policies Nomination Bill."\* Its object was to enable persons to secure to their wives and children the benefit of assurances on their lives by nomination endorsed on the policy. For the humbler class of policy-holders this advantage is obtained by the Friendly Societies' Act (18 & 19 Vict. c. 63, s. 31), which provides that any person, on whose death a sum not exceeding 50*l.* is payable by a society, may nominate his or her husband, wife, child, father, mother, brother, sister, nephew, or niece, to receive it. For those who effect policies of large amount, also, this benefit is practically obtainable by the system of settlement upon trust. Between these two extremes, however, there is a very numerous section of the public, to whom Mr. Shaw Lefevre's measure would be a great boon.

Mr. Scratchley† is the warm advocate of this amendment in the law, as he was of that for giving assignees the right to sue in their own names, now conferred by the Act of 1867. He petitioned Parliament in 1863 for these amendments. He says of the proposed system of nomination:

\* Bill 19, 1867, H.C.

† "Treatise on Life Assurance and Reversions." New Edition, 1867. Layton, 150, Fleet Street.

“This is intended to remove the most important and forcible of the legal obstructions, which press heavily on those to whom life assurance is most appropriate and valuable.”

We will take for an example the case of a man who, being engaged “in commerce or otherwise, and earning by his own labour a precarious income, depending upon his life, has effected an assurance in order to give his wife and family the means of support if prematurely deprived of his exertions. As the law at present stands, if the assured should die insolvent, or become so at any period whatever, after the policy has been effected, it would become the property of his creditors, to the exclusion of the widow and children for whose benefit it was originally obtained and kept in force, at, perhaps, considerable pecuniary sacrifice and self-denial. This result might, it is true, be avoided by making the policy the subject of a trust; but there are many reasons which operate to prevent small policy-holders from executing trust deeds, such as their expense, the difficulty of finding trustees, the complexity of their provisions, a natural desire to avoid transactions that involve legal formalities, which are so distasteful to men in all positions of life. And so generally do these objections prevail, that scarcely one policy in a thousand becomes the subject of a settlement upon trust. . . . Every man has nominally a legal right to protect his property from future debts, yet in the very cases in which one ought to be so protected, viz., where his means are limited, and the amount secured by his policy is small, it is practically impossible for him to avail himself of his legal right to do so. A state of the law which thus, practically, concedes to the rich, and denies to the poorer man, the privilege of setting aside a very small portion of his annual earnings, so small that no creditor could say the debt was contracted on the credit of it, or that the means of payment were thereby lessened, for the sacred purpose of supplying to his family the lack of his strong arm, should death lay

him low, could scarcely continue if it were generally understood."

With the urgency of this appeal we have every sympathy. Indeed, without waiting for the action of the Legislature, Mr. Bunyon has induced the directors of the company of which he is actuary to agree to grant settlement policies, by which they act as trustees for the assured. If even other companies were willing to follow this excellent leading, still the Nomination Bill of Mr. Shaw Lefevre would be necessary for Government assurances, and for numerous cases in which the settlement policy form drafted by Mr. Bunyon would not be available.

We recapitulate briefly the amendments in life assurance law which we think desirable:—

(1.) That all existing partnerships for granting life assurances should be required to register under the Companies Acts.

(2.) That the powers of investment of assurance companies should be restricted.

(3.) That the provisions of Mr. Cave's Bill relating to registration of accounts, and of the particulars of amalgamations or transfers, should pass into law.

(4.) That Mr. Shaw Lefevre's Bill, for enabling the holders of small policies to nominate their widows or relatives to receive the sums assured, should pass into law.

(5.) That the statutory limitation of the amount for which the National Debt Commissioners are empowered to grant life assurance policies to 20*l.* as a minimum, and 100*l.* as a maximum, should be altogether removed.

If this be done, those, on the one hand, who are content with absolute security for the amount they set aside for their families may take a Government policy, and nominate the relative who is to receive the sum assured. Those, on the other hand, who are dazzled by the past prosperity of some of the assurance companies,

and willing to cast in their lot with a speculative concern, will do so with all the guarantee that can be devised for their safety. They will know how their affairs proceed, be able to check the company if it enters on a ruinous course, and to control the conditions of amalgamation or transfer, if that should become necessary. More cannot be done for them; and, if these safeguards do not avail for their protection, they have only themselves to blame.

#### ART. II.—THE CITY COURTS.

THERE are 500 County Courts in England and Wales, the annual loss on which, some quarter of a million, is made good out of the taxes. There is one "City" County Court, the property of the Corporation of London, the business of which will for the present year leave a net profit from the fees of some 5000*l.* after payment of the Judge, the City Solicitor as Deputy-Registrar, and the other officials. The cause of the disparity is the same in each—the number of plaints. In the latter the number, although mostly small business, pays a respectable profit; in the former, although more than a million plaints may be issued by the 500 courts, the average sued for being little over 2*l.*, certain heavy loss accrues. A remedy has been suggested, by simply reducing the present heavy court fees on debts between 5*l.* and 20*l.*, and allowing the attorney some trifling profit. Recent legislation has only tried (ineffectually) to force suitors into the County Courts by refusing costs in the higher tribunals. The result was clearly shown by the judicial statistics for 1868. While writs of summons were reduced in number by 44,000, or more than a third of the whole, the average of the business in these 500 County

Courts was reduced from 2*l.* 7*s.* each in 1867 to 2*l.* 1*s.* 3*d.*, although the number of complaints was increased some 30,000.

The fact is, that in the majority of County Courts the total fees received do not pay the Registrar and Bailiff's salaries, and in a large number of instances there is not enough taken even to pay the Registrar's minimum salary of 120*l.* Several places indeed produce less than 50*l.*, and one only 30*l.* from all the year's fees! The salary of country Registrars is certainly too low for gentlemen who must be practising solicitors, and (except in the City Court) act as judges in trying undefended causes, and this minimum of 120*l.* is increased in a very unsatisfactory way:—4*l.* for each twenty-five complaints beyond 200 entered in the year, and as the average is only about 2*l.*, and only half the complaints reach a hearing, the total fees rarely average more than 4*s.* each, or about the extra salary for the Registrar alone. — The "City" Court, however, having no other court to affect its receipts, is a very flourishing concern in a financial sense. In all other respects its position is most anomalous. This court is a substitution for the old Court of Requests held by Commissioners under 5 & 6 Will. IV. c. 94, and derives its present jurisdiction from the Act 15 Vict. c. 77, a Local Act obtained by the Corporation to extend their first County Court Act of 1847; and the large powers given by the Legislature show very forcibly the necessity for the same careful supervision of Bills introduced into Parliament by the Corporation of London, as that wealthy body always exercises in respect to all Bills, Government or otherwise, in the least degree affecting their interests.

The County Courts Act, 1850, had given the General Courts optional jurisdiction to 50*l.* and the City reasonably enough asked for a similar extension, but so little was their Local Act scanned, that it contained a clause depriving Plaintiffs not recovering more than 50*l.* of all costs of suit, if the action might have been brought in the Sheriff's

Court, unless the Judge specially certified the action to be fit for a superior court. In two very material points the jurisdiction of the City Court is also much larger than any other County Court. (1st.) Where Defendant was employed only in the City, or had been so employed within six months of plaint. (2nd.) Where any part of the cause of action arose in the City without the necessity of any leave of Judge or Registrar. Had the lawyers in either House scrutinised this Local Act, it is most improbable that any of these additional powers would have been conceded, more particularly that of depriving Plaintiffs of costs between 20*l.* and 50*l.*, while all suitors elsewhere in the kingdom had an option between the County and Superior Courts. The Corporation also took the power, then possessed by the other County Courts, to levy 6*d.* in every plaint exceeding 20*s.* towards a building fund. This has been long since repealed for all the general courts, (although by reason of the loss in the great number of courts the total fees are not reduced,) but is still claimed and received at Guildhall Yard by the Corporation, in trust, we presume, for suitors. When the clause in the City Act affecting costs of suit between 20*l.* and 50*l.* came before the Judges, much surprise was expressed, and it very soon became a dead letter by their lordships invariably certifying for costs, and notwithstanding the vigilance of the five able lawyers employed by the Corporation, this power was swept away by the last County Courts Act, 1867, and by sec. 35 of that Act, the words "County Court" used in that or any future Act, are declared "to include the "City of London Court," and the rules and orders in force for the time being for regulating the practice of and costs in the County Courts, and forms of proceedings therein, are to be in force in the said City of London Court, to the exclusion of any rules and orders then in force in that court," reserving only powers for the Corporation to receive the fees. The County Court Act, 1867, as



our readers know, contained several very useful provisions, especially secs. 2 and 3. By the 2nd section creditors exceeding 2*l.* for goods sold for trading purposes can by filing an affidavit, given in the schedule to the Act, obtain a judgment for half the hearing fee, unless defendant gives the Registrar notice of defence. By section 3 the very convenient power given in 1856 to all suitors, resident or carrying on business in any of nine Metropolitan County Courts, to sue their debtors, resident or carrying on business in any other of such courts, is expressly extended to the City Court. On this useful section much needless trouble is thrown on suitors in the City Court. Although the Judge frequently explains the benefits of this section, and advises suitors to use it, when complaints are taken to the Registrar's Office, on entry the clerks are directed to inquire where the cause of action arose, and if there be any reason for considering same to have arisen in any part within the City, the summons is always issued under the Local Act of 1852, and fees for foreign service under that Act charged instead of the general County Court scale. Unfortunately the Judge is powerless to interfere directly, he does, however, all in his power to discourage this course by requiring suitors in such cases to prove a cause of action in the City, and nonsuits frequently happen, where plaintiffs had a clear right to sue in this court under the section in question. The extra cost of the summons issued under the old Act is generally trifling, but the increased expense in fees is carried through the proceedings. Consent judgments, for instance, under sec. 3, would only be half the amount of the old fee, and jury causes, applications, and notices also lower.

By secs. 16 and 17 of the County Court Act, 1867, Registrars are required to try undefended actions on contract, and to settle amount of instalments in admitted cases. The City Court has quite as many complaints as the largest Metropolitan Court (the number during 1869 was



about 16,000) and this court has also since January 1, 1868, been to all intents a County Court. We have also seen the extra matters of jurisdiction this court retains under the Local Act of 1852, and to these must be added the Admiralty jurisdiction under the Acts of 1868-9. The learned Judge and the Assistant-Registrar are everything that could be desired by the public and profession. The offices of Registrar and High Bailiff have, however, been vacant several years, and upon opening the court after the autumn vacation in 1868, the Judge, in pursuance of rule 8 of the Consolidated Orders, under the Act of 1867, appointed a qualified solicitor to act as Deputy-Registrar in the absence of the City Solicitor, whose other official duties prevented his personal attendance in court, and who, we understand, in fact, had refused to attend in court, and this gentleman sat in court several days as Deputy-Registrar, and exercised, for the only time in this court, the powers of the Act in trying undefended causes. Although more than a year has elapsed the suitors still wait the pleasure of the Corporation to appoint a Registrar competent and willing to discharge the duties in court. So much for the rules of court in the "City Court." As to the fee of 6*d.* in every plaint exceeding 20*s.* towards the building fund, although this must now amount to thousands of pounds, the old court in Guildhall Yard is the most inconvenient, the dirtiest, and from the crowds necessarily collected (the Judge himself having to try all causes, both defended and undefended), comparatively the smallest, alike destitute of any proper ventilation or firing, therefore equally unsuitable as a court in all seasons. The only accommodation for bar and solicitors are two benches, capable of sitting five each, one of these being used for the jury when required. The daily average of causes exceeds 100, and more frequently 200, and as no constable or officer is employed to keep order in the offices and approaches, the number ofouters and hangers-on greatly

exceeds any other court. Surely a little of this building fund might be usefully applied, if not in "building" a suitable court proportionate to the business and receipts, at least in providing some necessary accommodation for suitors, if indeed the time has not arrived for sweeping away all special powers and privileges of this City Court.

The Lord Mayor's Court is a municipal court—we believe the oldest in the land. Its practice is more like that of the Superior than the City Court. The regular Judge is the Recorder of London in office, with a permanent Registrar and Deputy-Registrar. All these offices are now held by gentlemen of undoubted legal ability, and, since the last abortive legislative attempt to force suitors under 20*l.* into the County Court, the business of the court has very much increased, to the satisfaction, we believe, of nearly every one, not excepting defendants as a rule, for although some moderate costs are allowed attorneys for all their work in cases exceeding 5*l.*, the court fees being very small, the total in ordinary cases little if anything exceeds the County Court, without the annoyance. For instance, the costs against a defendant under 10*l.* are 18*s* 6*d.*, and under 20*l.* only 24*s*. 10*d.*, while the court fee for summons alone in an ordinary case in the County Court. say 9*l.* and 19*l.* respectively, would be 10*s*. and 20*s.*; and the judgment by default would be even more in favour of the Mayor's Court, being, for these cases, only 7*s*. 6*d.*, and 12*s*. extra, against 18*s*. and 38*s*. respectively in the County Court for hearing, obligatory, unless the defendant consents to a judgment, in which case half the latter fees are saved, and then some costs will almost necessarily be incurred for witness and attorney. We have no desire to praise the Mayor's Court unduly; but the contrast in the sort of business attracted by their scale of fees, certainly justifies the opinion that County Court fees are unduly high, and that their reduction would benefit all parties, including the ordinary tax-payer, who now

makes up the serious deficiency in their annual accounts. There are two matters, however, in the Mayor's Court which we should like carefully considered. The power to remove their judgments into a Superior Court for the purpose of execution. This especially in small cases (say under 20*l.*, and beyond this there is no difficulty in suing in the Superior Courts), we consider acts oppressively on debtors in this way. We have seen that a judgment, say for 19*l.* odd, is obtained for about 2*l.*, and the action may have been served anywhere in England, but if execution against defendant's goods is required, the attorney's extra costs are over 2*l.*, and the sheriffs' fees some 3*l.* Much as we admire the present practice of this Municipal Court, we think suitors should be limited to the process of the court they select, and not be allowed thus to increase costs against debtors. It should be remembered that the Mayor's Court is strictly a local court, and until the Corporation, with their usual success, obtained their Local Act, the "Mayor's Court Extension Act, 1857," no process could be served outside the City boundaries; and therefore the removals of judgment were comparatively harmless. This court also exercises very large powers of "foreign attachment," by which, ~~under~~ a very old custom of London, money or goods in the hands of a third party within the City may be attached to answer any debt sworn to be due by their owner. By this custom such debtor is required to be solemnly called at three separate courts before such attachment issues; but, by the modern practice of this old custom, the attachment issues instantaneously upon an action being commenced, and an affidavit of indebtedness filed, and so far from the debtor, the defendant being "three times solemnly called," he is carefully kept in the dark that an action is commenced. The action in attachments in practice never being served. This "foreign attachment," by the same vigilance of the Corporation lawyers, has been carefully exempted from the "Debtors'

Act, 1869." As law reformers we would desire some proper examination into this old custom, and, without wishing its destruction, should like to limit its operation at least to causes of action properly belonging to the City of London, if indeed it should not be restricted to the same powers of attachment possessed by all the superior courts and other inferior courts by the "Common Law Procedure Act, 1854."

In many respects we consider the Mayor's Court, and its Local Act also, models for future County Court legislation; but, if intended for general instead of corporate benefit, many details would need revision, *e.g.* why should objections to the jurisdictions be limited to a plea which necessitates appearance in person, and, where defendant succeeds, no costs allowed. In the other City court suitors often speculate in actions against debtors at long distances, but, when they fail to shew jurisdiction, the usual result follows as to costs of defence. The doubt often arises whether two separate courts in the same locality, like the City of London and Lord Mayor's Court, are necessary or useful. Why not amalgamate their respective functions, availing of the Mayor's Court procedure above 5*l.* for its manifest advantage to suitors, and leaving smaller debts to be disposed of, when undefended, by the Registrar, as provided by the last Act, and entering opposed cases for the Judge's list, say, once a week. This would give an extra Judge for contentious business, and, at the same time, effectually relieve the Judge of the City Court from the matters of mere routine, which at present employ so much valuable time. We throw out this suggestion on the assumption that the "City" Court will retain a separate and Local Act; for ourselves we should greatly prefer placing the City of London in all respects on a level with Westminster, Lambeth, and all the principal towns and cities of the empire. We will hope that the Judicature Commission now sitting may inaugurate a new system for the benefit alike of suitor and practitioner.

G. M. W.

### ART. III.—EXEMPTION OF PRIVATE PROPERTY ON THE OCEAN.

**F**OREMOST amongst the vexed questions of public law which press for a solution, is the exemption of private property on the ocean from capture and confiscation as prize of war.

The cases on this branch of the law of nations range themselves under two classes—first, where the trader who engages in commerce with a belligerent power is the subject of a neutral State; and secondly, when the country of which he is a subject is itself one of the belligerents. Of these cases the former is that which it is proposed in the first instance to examine, not only because it involves more directly a conflict of law, but also from the larger commercial interests with which it deals.

It may be useful at the outset to state what the position of the law on this subject is, as laid down by judges and text-writers of authority on the law of nations. It is thus stated by Chancellor Kent—"It is," he said, "a well settled doctrine that there cannot at the same time exist a war for arms and a peace for commerce." \* And to a similar effect is the language of Sir William Scott—"There exists," he observed in a well-known case, "such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the express permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershock as a universal principle of law." † This doctrine, which may be known as the rule of identification, thus so explicitly stated, and at the time of universal acceptance, rests on two theories or positions, one peculiar to the law of

\* 1 Kent's Com., 75.

† The Hoop, 1 Rob. Rep., 201.

England, the other, of more general obligation as an axiom in jurisprudence. The first of these is the principle alluded to by Sir W. Scott in the case quoted, that, by the law and constitution of this country, the sovereign alone has the power of declaring war and peace; and the second is, the position that, under the law of nations, on the commencement of war, each citizen is so closely identified with the government of the State of which he is a member, as to become personally an enemy of the nation with which his country is at war. To adopt the language of a distinguished American judge, "Every individual of one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country." And again—"Whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times may have established, there has been none on this point. 'The universal sense of nations has recognised the demoralizing effect that would result from the admission of individual intercourse between States at war.'"

Connected with these two propositions is the further principle under which sea-borne property, whether ships or goods, is from the mere circumstance that it is sea-borne placed in a different category, and is the subject of different laws from property on land; this distinction lies at the root of the modern theory of the law of prize.

These principles were not, it is to be observed, laid down without qualification. At the same time that they took their place amongst the admitted doctrines of the public law of nations, they were guarded by certain exceptions which have also received judicial sanction, and the recognition of which has led to the direct conflict of law which exists on these subjects. These exceptions have operated to produce that alteration to which Sir W. Scott referred when he spoke, not without much censure, of those whose aim it was to change the nature of hostilities as it has ever existed amongst

\* By Ch. J. Marshall, in "*The Rapid*," 8, Cranch's Rep., 155.



mankind, and to introduce a state of things which had not yet been seen in the world—that of a military war and a commercial peace.\* To the proposition, for example, that there cannot be at the same time a war for arms and a peace for commerce was attached the qualification, which during the recent war with Russia had such a large influence on commerce, that trade with an enemy might be carried on by the express license of the sovereign; an exemption from the liabilities and forfeitures arising out of a state of war, which it was further held should receive a most liberal construction.† Again, the trader who was a subject of a neutral State was warned that the first duty of one in his position, was wholly to abstain from direct or indirect interference by way of aid to either of the belligerents—absolute non-intervention being of the very essence of neutrality. But it was at the same time no less distinctly laid down in a cause before a great tribunal, and in the language of a distinguished judge, “That commerce on the part of a neutral with a belligerent constituted no offence against the law of nations; and that even when armed vessels or munitions of war were the subject of sale, the neutral shipper of such articles was not, in the absence of specific treaty engagements, an offender against his own sovereign, or liable to be punished by the municipal laws of his own country. The transaction was a commercial adventure which no nation was bound to prohibit, and which only exposed the persons engaged in it to the penalty of confiscation.”‡ And this doctrine, in support

\* *The Maria*, 1. Rob. 340.

† 4 Rob. 11. 13 East, 332. And see Duer's *Marine Insurance*, vol. I. p. 594, *et seq.*

‡ By Story, J., in the *Santissima Trinidad*, 7 Wheaton's *Inter. Law*, p. 283. The same doctrine was upheld in our courts recently by Westbury, C., in *ex parte "Chavasse"* jurist N.S., May 20, 1865, and by Dr. Lushington in "*the Helen*," *ibid.*, Dec. 20, 1865. See, on the other hand, Phillimore, *Inter. Law*, vol. III., p. 321, *et seq.*, who differs from Judge Story on the point whether the sale of the munitions of war to a belligerent in the territory of a neutral is illegal; such a transaction he holds to be contrary to the principles of eternal justice, and the reason of the

of which may be cited almost every authority of weight on questions of international law, has recently been the subject of investigation in the courts of this country, where it has received implicit confirmation.

So that we have here one cardinal rule, namely, that the neutral may trade with a belligerent, subject to the incidents of capture and confiscation, of which as a matter of adventure he takes his chance. On the other hand another conflicting rule obtains, which is at least of equal force, that a neutral shall not interfere in the war in any way whatever. Trade with an enemy in like manner is forbidden to a subject of a State at war; and this doctrine has in its turn received extensive qualification by the system of licenses under which such a trade is openly permitted. These principles present a direct conflict of law. The exertions indeed of modern jurists and statesmen have in recent times been directed to reconcile them, and to lessen as far as may be the severity of their incidence on the neutral trader, and decisions of courts and acts of governments have advanced so far in the adjustment of the questions of commerce with an enemy or a belligerent, as to suffer it, as we have seen, to be carried on *sub modo*, that is to say, subject to the rights of capture and confiscation if contraband. Thus a proceeding which in one view of it cannot but be regarded as a marine tort of the gravest kind, is on the other hand declared to be at the same moment a legitimate transaction of commercial adventure, and one clothed with its proper contractual obligations. "In fact," as observed by Lord Westbury, in a recent case, "the act of the neutral trader in transporting the munitions of war to the belligerent country is quite lawful, and the act of the other bellige-

thing, and that in principle there is no difference between the permission to a neutral to sell warlike implements, and that of allowing the enlistment of troops; both being in his judgment alike inconsistent with the duties of neutrality. Of the superior morality of this view of the case, and the greater advantage that would ensue from its strict observance to the avoidance of international complications, there cannot, it would appear, be any doubt.



rent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are co-existent, and the right of one party does not render the act of the other party wrongful or illegal.”\*

But this is not the only exception which has broken in upon the rule, that trade with an enemy or belligerent on the part of subjects of a State at war, or of a neutral State, in articles contraband or of use in war, is illegal. The doctrine of domicile as governing the allegiance of private persons, and determining their *status* as a matter of public law, has had its influence in assisting private persons to escape from the rigour of the rule as laid down by Sir W. Scott, for under the law of nations the national character of a person as neutral or enemy is determined by that of his domicile; but yet the property of a person may acquire a hostile or neutral character, as the case may be, wholly distinct from, and independent of, the nationality that springs from personal residence. “There is,” to use the expression of a great judge, “a traffic which stamps a national character on an individual independent of that national character which personal residence may give him.” † And this doctrine which dissociates the private character of a trader from the artificial personality, so to speak, which springs from commerce, enabling him at the same time to fill two characters, and by insisting on the immunity attaching to one to escape from the obligations and disabilities incident to the other, cannot but have, and has had, a wide operation in preserving for private property exemption from the consequences of war. It supplies another instance of that struggling of an ever-growing commerce to get quit of artificial hindrances to its expansion, and of its refusal to be bound by *dicta* which belong to a system of public law which seems destined soon to receive large modifications, if not wholly to disappear; a system which owes its acceptance amongst English jurists

\* *Ex parte* “Chavasse,” Jurist, N.S., May 24, 1868.

† By Story, J., in the *San José Indiana*, 2 Gall, Rep., 268.

more, probably, to the character and influence of one distinguished judge than to any principle which can be relied on as a fixed element in jurisprudence.\*

The truth is that the proposition, that there cannot be at the same time a war for arms and a peace for commerce, a condition of things towards which the necessities of modern transactions are surely gravitating and forcing upon the acceptance of statesmen and jurists, was regarded with much distaste by the school of civilians of which Sir William Scott was the chief. The whole course of Admiralty decision, in cases where the rights of belligerents and those of neutral States conflicted, shows that they came with averted eyes to any concession which would serve to give the *status* of a neutral power a more defined or favourable place in the public law of nations. And certainly there can be but little doubt in the mind of any one who has investigated the subject, that the problem, how to give effect in the administration of international law to the growing power of commerce, and to assist in placing neutrals or private traders in the position which they would assert for themselves, so as to surround their contracts with the necessary legal sanctions, presents difficulties of no common kind. For example, one principle on which this doctrine of the incompatibility of war and commerce has been made to rest is, to use the language of Sir W. Scott, the total inability to sustain any contract by an appeal to the tribunals of one belligerent State on the part of the subjects of the other; and, in giving judgment on a case in which the point arose, † he goes on to remark that “the *peculiar law*” of our own country applies this principle, which he admits to be “less politic,” with great rigour, an observation which may without injustice be extended to all cases in which that law had occasion to deal with the rights of neutral countries or

\* For example—the rule of war of 1756, forbidding all commerce with the colonies of the enemy, has now taken its place amongst those principles of public law which have fallen into desuetude.

The Hoop, 1 Rob, Rep., 201.

the property of private persons, in connection with contracts springing directly or indirectly out of a state of war. \* But in the received view of his position the individual alien enemy had, as the phrase went, no *persona standi in judicio*; he was totally *exlex*; and as his contracts could not by any process known to the law be enforced, they were held not to be, in one view of them, legal contracts at all.

This question has hitherto been treated as one of law resting on the assumption of the identification of the individual with the State, and the consequent resulting responsibility. But, in truth, the theory, however convenient for purposes of government, seems wholly artificial. Is there in principle any such identification? The right of commerce, for instance, of that trade which consists in the free application of individual labour and enterprise to the supply of the necessities of mankind, and the free circulation of wealth, has it in its own nature anything in common with acts of governments based, perhaps, on treaty obligations more or less obscure, and the violation of which involve considerations rather of polity than of morals? Or can it be derived from the State, which, however it may prescribe the conditions under which trade can be carried on, cannot give that trade existence, or do much more than remove obstacles in the way of its growth and extension? And so again—an inquiry which is collateral with the preceding—is there in the reason of the thing any ground for the distinction which, as a point in the law of nations, has been so much laboured, and which lies at the root of the modern

\* “The great authority, the penetrating sagacity, and the inimitable style, of Lord Stowell, who filled the chair of the High Court of Admiralty in England during the whole of the last great European struggle, have served to vindicate the system of law which he administered, and even to palliate acts of cruelty which a judge of inferior reputation might have hesitated to enforce. But the jurisprudence of international courts would fail to perform its high duties in regulating upon legal principles the differences of empires, if it were not so guided and administered as to meet the wants of a progressive age, and to apply to these delicate questions the more humane and temperate maxims which have happily prevailed in every other branch of public affairs.”—*Edinburgh Review*, July, 1854.

theory of the law of prize, between goods the property of private persons on shore and the same property when in the form of a cargo afloat? How can these so differ in principle as to justify the capture and confiscation of the latter, or the loss arising from its being detained and sent into port for adjudication, while property of the former class is wholly exempt from a procedure so disastrous, or at best vexatious? If the plunder of an industrious merchant be thought disgraceful on land, why should the proceeding be regarded with greater favour because it takes place at sea? \*

“That an individual citizen,” observes Sir Travers Twiss, “of a neutral State should be liable to be treated as an adherent of a belligerent power, whilst the nation itself of which he is a member maintains neutrality, presents no difficulty.” † This statement of the law is no doubt correct, but the converse of the proposition, which if adopted would give extension to private commerce, has not as yet been admitted. For the private trader, a member of a State at war, is under the existing law of nations identified with the State of which he is a citizen, to the extent of subjecting his property sailing under its flag to capture and confiscation. If there is a separation of interests in the one case for the sake of the belligerent, why not in the other for the sake of the trader?

These are some of the considerations which embarrass the treatment of this difficult and interesting subject. Two forces are in antagonism—War and Trade; how can these be reconciled, or do they admit of reconciliation? Amidst,

\* “Private property,” says Wheaton, “is exempt from confiscation with the exception of such as may become booty in special cases, when taken from enemies in the field, or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory.” *Inst. Law*, p. 420; and see Twiss, “*Law of Nations, Time of War*,” pp. 108, 135; as to the refined distinction, which, however, is well settled, between shipping found in an enemy’s ports, and which is liable to seizure or confiscation, and *cargoes*, the property of private persons, which are on all hands exempt from such consequences.

† “*Law of Nations, Time of War*,” p. 435.

however, the conflict of opinion on the question, one fact presents itself which cannot be set aside, and that is, that while war is unnecessary, and, in theory at least, may be regarded as capable of indefinite mitigation, and ultimately of ceasing to exist altogether, the necessities of trade have increased, are still increasing, and with every hour's growth in progress and civilization demand room for expansion and development. If, therefore, in any system of law two principles are found opposed, both of which are at the same time the subject of judicial recognition, as having certain rights attaching to them capable of being enforced, but of which one is in harmony with the advance of nations, while all the efforts of society are directed to abolish the other, it is not difficult to see which of these forces will be in the ascendant, and suffer in its advance no opposing rule, whether of the law of nations, or in any system of jurisprudence worth the name, to occupy any place. It is, in the meantime, obvious that the position in which this question is placed by contradictions so palpable, finds international law comparatively powerless as a means of pacification, just at the point where its intervention as an efficient method of solving any difficulties that may arise in the intercourse of nations is most needed. Such a state of things involves this consequence amongst others, that it is opposed to the observance of a true neutrality in any real sense of the word, and it may also lead, in the present state of the growth of manufacture and transportation of commodities, united with the increased legislative favour shown to trade, to further complications which it is eminently desirable should be averted in time of peace before their influence on property, national as well as individual, is felt during a state of war.

It remains to notice one aspect of this question upon which much stress has been laid by those civilians who wish to see the existing rule on this subject maintained or even extended as a principle of public law bearing on the intercourse of nations. During the Crimean war the

rule of intercourse with the enemy was much relaxed, not only by England but by France and Russia. The Order in Council of April 15, 1854, permitted British subjects to trade freely to Russian ports not blockaded, in neutral vessels, and in articles which were not contraband of war, but not in British ships.\* The French orders were to the same effect. The Russian Declaration of April 19, permits French and English goods, the property of French and English citizens, to be imported into Russia in neutral vessels.† The French and Russian Governments also allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph.‡

Upon these Orders in Council, which it is obvious indicate a marked advance in the removal of the disabilities which in time of war pressed so heavily upon neutral States, it has been observed by a learned writer that they must be regarded as special regulations adopted from reasons of policy applicable to that war, and as to which each nation must in any future war judge for itself. This is inferred chiefly from the subject not having been one selected for deliberation by the parties to the Declaration of Paris in 1856. But, in truth, when once a step of this kind in national progress is made in advance retrogression is impossible. The concession made takes rank amongst the allowed principles of public law, and it may well have been thought by the diplomatists assembled at the congress that the question was one which might safely be left for solution to more just views and the increasing necessities of commerce. The position of the case is this:—on one side is the view, now so generally adopted both by private merchants and corporate bodies, that, as stated by Mr. Dana,§ all trade should be left free, and that the opera-

\* *London Gazette*, April 18, 1854.

† *London Gazette*, May 2, 1854.

‡ *Courrier des Etats Unis*, 23 July, 1855.

§ Wheaton's International Law, by Dana, 401.



tions of war should be confined to government property and persons and vessels in belligerent employment; an opinion which is supported by the argument that the commerce of such a country as England is too vast to be protected by her navy, and that she would lose more than she would gain in a contest of captures with any power; and that if direct trade with enemies was not permitted the only consequence would be that neutrals would carry the cargoes, and the belligerents would not be crippled in commerce or resources except as to the employment of their own ships and sailors; a result which would not operate to the advantage of England. To this may be added that such an extension of private rights as is here advocated would render privateering unnecessary. The reasoning in support of the opposite view rests on that theory of international law which identifies each citizen with the policy of his government in war; a theory which may be termed as that of association. On this side of the controversy may be ranged the authorities of Mr. Justice Story in America, who, in a well-known case,\* observes on the inconsistency of permitting an American citizen to carve out for himself a neutrality on the ocean when his country is at war, and of allowing an engagement to be legal which confirms in him the temptation or necessity of deeming his personal interests at variance with those of his government. And to a like effect is the opinion of Sir R. Palmer, in England, who has stated in so many words that a political war and a commercial peace are inconsistent.

This latter view has the support also of Professor Dana, one of the most learned of American publicists, who, in his edition of Wheaton's International Law thus expresses himself:—

“The truth is, the most humane, and often the most efficient part of war, is that which consists in stopping the commerce and

\* The “Julia,” VIII., Cranchi, Rep. p. 180.

cutting off the national resources of the enemy. . . . Driving his general commerce from the sea, and blockading his ports to keep neutral commerce from him, must diminish his resources and tend to coerce him. It is the least objectionable part of war. It takes no lives, sheds no blood, imperils no households, has its field on the ocean which is a common highway, and deals only with persons and property voluntarily embarked in the chances of war for the purpose of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill most men and sink the most vessels, but a grand national appeal to force to secure an object deemed essential when every other appeal has failed."\* And again — "Nations should have it in their power to coerce the body politic they are at war with, by a coercion applied to all its citizens, in all their interests, and to identify the private interests of each of their own subjects with the national fortunes in the war."

This reasoning is not without its force, and the argument has lost none of its value from the way in which it has been stated by the learned author. We may well hesitate, however, before we admit it conclusive upon the important point of international law which it is employed to enforce. On all hands it is conceded that the exercise of the *summum jus* of war must be modified by a regard either to treaty stipulations, or the higher obligation of observing good faith on the part of nations engaged in a state of war. It is, for example, the allowed right of a belligerent to confiscate the enemy's property found within its ports on the breaking out of war. The absolute *right* to convert such property is inherent in the sovereign power of every State. But the usage of nations, and the principle of reciprocity, imposes a limitation upon the exercise of that right which no people is at liberty to set at nought. And so with concessions to neutral rights and in favour of private property on the ocean. It has been urged that to yield

\* Dana's Wheaton, note, p. 401.



on this point would be impolitic, inasmuch as by identifying each individual citizen for the purposes of war with the government of which he is a member, he becomes, it is said, more directly interested in bringing the hostilities from which he suffers to a rapid conclusion. But, in the first place, this reasoning seems wholly opposed to the principle under which large concessions—which cannot be now recalled—have been made to private commerce, and also to be at variance with the more equitable spirit in which implied international obligations have, in modern times, been interpreted. The argument pushed to its logical extreme must be, that *all* mitigation of the evils of war is impolitic, because by lessening the intensity you prolong the duration of hostilities; a view which, if followed to its legitimate consequences, would simply forbid any interference whatever with the extreme exercise of the rights of war, or any efforts to soften its rigour.

If the present rules and practice obtain, and this country engages in war with a maritime people, as for instance the Americans, the first consequence would be that the entire carrying trade would pass into the hands of a neutral State. But there would be a further result. It is on all hands allowed to be desirable, and it was one of the points considered at the Congress of Paris in 1856, that privateering should be abolished. The matter fell through at the time from the plenipotentiaries being unwilling to concede the further point (insisted upon by the United States as a condition precedent) that private property at sea should be exempt from capture. Now, to a nation who has no regular, or but a small naval force, privateers fitted out under letters of marque constitute a most legitimate and valuable part of the military marine. They are the means of rendering the mercantile seafaring classes of the population directly available for purposes of war; and bear the same relation to national or public ships that volunteer troops on land have to the regular army. The employment

of such vessels is therefore the only means whereby a State which does not maintain an armed fleet during peace can hope to contend against a great naval power during war. At the same time this force is from its very nature exposed to much irregularity, and is liable to abuses from which, owing to their more strictly defined character, public vessels of war are free. Its abolition therefore, and the confining of naval operations to ships regularly fitted out and commissioned, would have the result of abridging the duration of war, of rendering needless the vexatious and practically useless right of search, and avoiding those complications and that injury to commerce which is so likely to arise from the employment of an irregular and imperfectly disciplined marine. Under no circumstances, however, can an approach be made to this result save by rendering the use of such vessels almost or entirely needless, by surrounding the property of private persons at sea, wherever found and by whomsoever carried, with a protection which should be enforced as a recognised rule of public law and usage of nations.

In fine, the tendency of modern opinions on this interesting question, certainly amongst continental and American jurists, is to confine the operations of war, as on land to armed and disciplined troops, so at sea to the public commissioned ships of the belligerents. On the other hand, in the interests as well of humanity as of trade, the persons and property of citizens who are not identified with the cause of war otherwise than by being subjects of the powers engaged, should be as much as possible exempt. By a process of reasoning, similar to that which in the interests of neutral powers severs the cargo from the ship in which it is conveyed, it is with justice argued that the property of commercial persons and bodies corporate should be subject to no other burdens as incident to a state of war than the liability to additional taxation; or, if goods are directly in transit to a belligerent port, or are openly contraband, or the trade is

of a hostile character, such as conveying signals between fleets, and conveying hostile persons or papers, to capture and confiscation as prize of war. The maxims still in theory binding, that there “cannot be at once a war for arms and a peace for commerce,” and that each individual citizen is an enemy of the country with which the State of which he is a subject is at war, will gradually, like the rule known as the rule of war, of 1756, forbidding a neutral to trade between a parent State and its colonies, fall into desuetude, and be no longer spoken of by civilians, or enforced by international tribunals, as binding principles of international law.

#### ART. IV.—THE LAND QUESTION.

*The Law of the Farm.* By H. H. DIXON, Esq., Barrister-at-Law. London: Stevens and Sons. 1863.

*The History of Land Tenure in England and Ireland.* By W. F. FINLASON, Esq., Barrister-at-Law, Editor of “Reeve’s History of the English Law.” London: Stevens and Haynes. 1870.

**P**ROBABLY the most interesting aspect of the Irish Land Question, at least to English readers, is its bearing on the land question in England.

As a writer in the *Times* observed:—

“Mr. Goldwin Smith concludes one of the best of his works—the essay on ‘Irish History and Irish Character’—with a calculation of the advantages to be derived by England from its union with a country less settled than itself, and among these possible benefits he enumerates the origination of wholesome reforms. Englishmen are, in comparison with Irishmen, so well off and so fairly satisfied with their institutions and their progress that they might be disposed, as far as they themselves were concerned, to neglect desirable improve-

ments; whereas in Ireland the necessity for these improvements being more pressing and manifest would force the subjects forward for discussion, and then the discussion would lead to the establishment of principles applicable with advantage to the rest of the empire. Just so; as Mr. Goldwin Smith also remarked, in Ireland the relations of landlord and tenant have first been made the subject of debate."

This accounts for the intense interest taken in the subject in this country, so soon as it was once ascertained that the Government really intended to deal with it; English landlords of the highest rank and position—and even peers of the realm—immediately addressed themselves to it in earnest, and the result of discussion was most remarkable. As the *Spectator* observed:—

"There is something perfectly astonishing in the progress made by the Irish Land Question within the last few months. It is almost too great to be trustworthy. Years ago, when we suggested the principle of a perpetual settlement,—such a settlement as that of the land in Bengal,—as the true remedy, we did not then say, and do not now say, for the *economical*, but for the *political* miseries of Ireland, our suggestion was treated in the press as that of a political eccentricity not far removed from lunacy. When Mr. John Stuart Mill took up a very similar ground two years ago, and published his celebrated pamphlet on the Irish Land Question, he was not very much more favourably received. Even the extreme Radicals treated his proposal as monstrous, and had he made in Parliament a motion founded on his pamphlet, it is not likely that he would have got three English Members to follow him into the lobby, and not many Irish. Well, at the present moment, a perpetual settlement in Ireland, *i.e.*, fixity of tenure for the tenant in all cases except that of non-payment of rent, is so far from being a mere chimera, that there is at present *no party* in Ireland, not even the ultra-Conservative, which does not contain a number of strong advocates for it, while the landlords can scarcely get any newspaper to take up their side, or to brand the new doctrine as one of confiscation." — *Spectator*, September 25.

Mr. Charles Buxton, in the first of a series of useful and interesting letters on the subject, made some similar remarks. The progress of the question, he said, in the course of a few months, had been astounding. It was agreed, on all hands, that there must be security of tenure; compensation would no longer satisfy the Irish tenant. This was not surprising. A quarter of a century ago the Devon Land Commission reported that the tenant was entitled to compensation, and repeated measures for the purpose of securing it have been prepared, and more or less approved; even a Conservative Government brought in a Bill for *retrospective* compensation. Yet, after a quarter of a century of abortive attempts at legislation, the Irish tenants were told at last by the imperial Legislature that they had nothing to expect from legislation, and that they must take care and provide contracts, and not only so, but *contracts in writing*! What was the effect of Mr. Cardwell's Acts and Lord Clanricarde's Bill. Contracts in writing! As if it mattered a straw whether the contracts were in writing or not, if their terms were oppressive. Or, as if the Irish tenant would not be only too happy to have fair and equitable contracts if he could get them. And as if the whole evil was not that he was unable to get them, because in an unequal position as compared with his landlord. That was in effect just what the Devon Land Commission reported twenty-five years ago. And, in the face of this, to tell the Irish tenant to get good contracts, and have them in writing, was an insufferable and offensive insult. It was adding insult to injury in the most irritating and exasperating form.

Of course this could not satisfy a Liberal Government, and Lord Granville, on their part, declared that they were not as yet prepared to legislate on the subject. It was full time. No one can doubt that the state of the land question was the fruitful cause of trouble and agrarian outrage. Thus the *Times* spoke of one well-known case:—

“Let us take the example of Mr. Scully, of Ballycohey. It is such men that have compelled the State to legislate on the social condition

of Ireland. Mr. Scully was the owner of lands held by a certain number of tenants. He gave them notice that, unless they assented to contracts of tenancy, giving him the power to oust them at a moment's notice, they must immediately yield possession. They felt themselves powerless in the presence of their landlord, they knew there were others ready to become tenants, they knew they had no place to which to turn if they quitted Ballycohey, and they organised an attempt to murder Mr. Scully when he proceeded to serve his notices upon them. Yet Mr. Scully acted strictly within his legal right. He said, as any landlord may say, 'Agree to my terms, however fantastic, capricious, inequitable they may be, or quit.'

Nor was this at all an isolated instance. Other and similar cases have, from time to time, occurred, which read the same dreadful lesson. There are two reported in the *Times*, and stated and commented on by the *Spectator*.

"Two such cases of agrarian murder have been elucidated in the papers of this week,—one, the case of '*Clarke v. Knox*' by the *Times*' Commissioner in Ireland,—a case in which the unfortunate tenants were served with notices of ejectment by a proprietor wishing to sell because the proprietor wishing to buy would not buy except free from all sub-tenancies. They were assured that these notices were only formal, and then directly the transaction had been completed, they found, to their cost, that they were really to be ejected, in spite of all these assurances,—though the agent was so shocked at the transaction that he threw the whole onus of it on the proprietors, and declared that if the tenants were turned out, it would be an 'unparalleled outrage.' The other case is almost equally illustrative of the true cause of the hatred felt for the law, and the sympathy felt with vindictive murderers who have wreaked their vengeance on those who chose to enforce the law. It is the case of Mr. Hunter's murder in Mayo, the history of which has been lucidly told in the *Echo*. In that case, Mr. Hunter, a Scotchman, had taken the lease of an estate on which rights of turf-cutting had been held from time immemorial by a certain number of peasants, but the reserve of these rights had, by an oversight, been omitted from the lease. The grantor of the lease at first himself paid the lessee,—Mr. Hunter,—



enough,—it was only 3*l.* a year,—to cover these poor persons' rights, as the reserve of their privilege had been left out owing to his own negligence. But when this gentleman sold his estate to a new proprietor, Mr. Hunter raised his demand from 3*l.* a year to 10*l.* a year, which the new proprietor was unwilling to pay; and accordingly Mr. Hunter brought a suit against one of the peasants who cut turf for trespass, and the man was fined 5*s.* and charged 48*l.* for costs,—the decision going against him through some defect, it is supposed, in the getting-up of the poor man's case. The peasants had regarded it as what, in fact, it was, only a dispute between the lessee and the proprietor—their rights having been so long unquestioned—and when one of them was suddenly fined 48*l.* costs and his crops seized by Mr. Hunter by way of distress, the rage inspired by the act was so great that Mr. Hunter was murdered."

And then the *Spectator* observed, commenting upon these cases :—

"These two cases are perfect sample cases of the wrongs which give rise to these fearful agrarian crimes, and to the still more dangerous hatred of the law, as a law deliberately unjust to the peasant, and therefore earning for such revenges the sympathy of the people. Now, what seems perfectly clear is, that to undermine this spirit, to turn the feeling of the peasantry towards the law into one of respect for a just law which protects and never robs them, it is absolutely essential that tenancies-at-will in Ireland should virtually cease; that there should be a fixed minimum term, at least, within which no tenant should be dispossessed, except for non-payment of the rent agreed upon—that the presumption should be on the side of the tenants, at least for a fixed time, and not on the side of the owner.

"And, in point of fact, the more evidence accumulates on the subject, the more certain it becomes that the root of the *political* disease of Ireland—by which we mean the root of that popular spirit which excuses agrarian crime and regards the Government as its natural enemy—is the shamefully insecure position of a people who see themselves always exposed to the danger of being suddenly and arbitrarily deprived either of the fruits of their own hardly-earned labour, or of customary rights which by long usage they

have learned fairly enough to regard as their own. There are very few agrarian murders in Ireland which, when carefully inquired into, do not turn out to be due to some such flagrantly unjust dispossession. And yet there are numbers of such flagrantly unjust dispossessions which do not ever lead to murder, and of which consequently we hardly hear in England."

Nor could it be deemed any adequate answer to such cases that they were comparatively *rare*: for at all events they did constantly occur, and that often enough to infuse an element of constant apprehension and insecurity into the whole relation of landlord and tenant. As a writer in the *Times* observed:—

"The real grievance, as we have so often pointed out, is the general insecurity of tenure—an insecurity far greater, in fact, than prevails in this country, and infinitely more baleful in its influence, inasmuch as the population which suffers under it has no other industrial resource but agriculture. It is vain to speak of this grievance as 'sentimental,' because evictions are now rare, except for non-payment of rent. Arbitrary evictions may now be rare, though not so rare as many suppose, but it is a very few years since they were common, and not long since thousands of Irish homes were annually desolated by clearances, not without excuse on economical grounds, but morally indefensible. But let us assume that arbitrary evictions are and always have been rare; that is, that not above a few hundred families have been driven in each year to the workhouse by the march of agricultural improvement. What follows? Are not agrarian murders rarer still, even in the very worst years, and yet do not ten or twenty such murders spread an universal sense of insecurity? Is it, then, so unreasonable that a number of arbitrary evictions which looks small when compared with the half-million of Irish tenants, should nevertheless be quite sufficient to make the great mass of Irish tenants feel as if a sword were hanging over them? Nor is this by any means the whole case. Trifling as the proportion of arbitrary evictions may be, the number of notices to quit served every half-year is known to be enormous, and is probably increasing. In a great majority of instances, it is true, no action is taken or intended to be taken upon them, and the tenant may rest tolerably



safe against disturbance. They are served, in fact, as a mere formality, the motive being to keep alive the landlord's right of resuming possession, and to bar, if possible, the operation of any Land Bill which Parliament may pass. But how can such a practice fail to bring home to a tenant's mind his absolute dependence on the will of an individual, and how can we marvel at his passionate longing for a practical security of tenure, which his ill-advised counsellors have taught him to call "fixity of tenure?" It is possible, we believe, without infringing the laws of political economy or equity in the slightest degree, to quiet for ever this sense of insecurity."—*Times*, November 5.

It soon became recognised in England and Ireland that there must be security for compensation, and also against arbitrary eviction, for the two things were correlative, and the one without the other would be of little avail. In a very short space of time it was settled by public opinion that there must be an end to arbitrary eviction. And, as the *Times* truly observed:—

"There are certain phrases which once spoken exhibit a revelation of the public mind from which there can be no recall. When the words 'Household Suffrage,' for example, were used by Sir Roundell Palmer as indicating the only sound limit of Electoral Reform, it was felt at once that it would be impossible to stop short of that line. In the same way the phrase, 'No capricious eviction' has been pronounced, and has excited an echo. The days of 'capricious eviction' are passed by. Mr. Buxton quotes Lord Castlerosse's declaration—"The occupier of the soil has a right to be protected from arbitrary or capricious eviction,"—words repeated by Lord Fingall, and adopted in substance by the sons of the late Lord Lieutenant, the Duke of Abercorn--and concludes that the period of the uncontrolled subjection of the tenant to his landlord is over."

And it is most interesting to observe the gradual process of development of principles by which men were driven as to some great change in *tenure*. An English peer, who is an Irish landlord, Lord Portsmouth, actually avowed at a public

meeting, that tenants' improvements often amounted almost to the value of the fee simple:—

“He denied the statements of a certain class of speakers and writers, who spoke of Irish tenants providing their own buildings as the exception and not the rule. As an Irish proprietor he could say that there were few instances in which the buildings were provided by the landlord; indeed, a friend of his who had resided in Ireland for a number of years had said that he could count those cases on his fingers. One objection to assimilating Irish tenure to English tenure was that tenants often laid out such a large sum of money on their estates that it would cost a sum nearly equal to the fee simple to buy them out if the landlord wished his land to change hands. That would not pay.”

It would not pay for the landlord to compensate at such a rate, no doubt; neither would it pay for the tenant to have no compensation, and to have to pay for his own improvements either in rent or in purchase money. The only alternative would be a *perpetual tenancy*. And accordingly it was soon admitted that this was a natural result. The most important observers—English landlords, not likely to be too favourable to tenants—admitted something anomalous in the condition of the tenant in Ireland. Thus, Mr. Walter said:—

“You must be quite aware that the relations between landlord and tenant in Ireland are as different as anything possibly can be from the relations which exist between landlord and tenant in England. I am quite certain that if it were possible for the relations between landlord and tenant to be in England what they are in Ireland, nothing could preserve the harmony and good feeling which here exist, and have never been more conspicuous than at the present moment. The difference, in a few words, is this: in England a tenant takes a furnished house, and all the landlord expects is that he will keep it in as good condition as he took it. But in Ireland the state of things is different. As a general rule the tenant does everything; he builds the very house he occupies, or if he does not build it he pays some outgoing tenant who has. The landlord does not provide a single shed or building, and it is an understood thing that

the tenant does everything except provide the land itself. It stands to reason that if a tenant takes an unfurnished farm, without any building or drainage, and with nothing but the naked ground ; if he has to put up buildings and provide all other agricultural furniture himself, and is then liable to be turned out at a moment's notice, his furniture seized without compensation, that such a transaction fully deserves the epithet which Lord Clarendon the other day applied to it, of a 'felonious act' on the part of the landlord. The state of things I have described has brought about the miserable state of the relations existing between landlord and tenant in Ireland. They have got a thoroughly bad system from beginning to end. The best thing that could happen would be for the system existing in England to be adopted in Ireland. It would be better both for landlord and tenant that the farm should be let with all the permanent improvements done by the landlord, and nothing but the ordinary operations of agriculture performed by the tenant. If it be impossible to get out of the present system—and I conceive that it will be impossible for a considerable time to come—the next best thing to do is to make such equitable arrangements as the case requires during the interval which must elapse, and I believe there will be no real difficulty in effecting it if parties on both sides of the House are prepared to do what is just and equitable—if the Irish landlords recognise under the present grave circumstances what is their duty, and Irish tenants are prepared to be content with what is just and equitable, and not set up preposterous claims, which no English landlord would grant for one moment."

And such opinions were put forth by Mr. Charles Buxton in his admirable letters on the subject.

Even those English landlords who opposed any notion of fixity of tenure, dreading the application of it to England, opposed it on the ground that in this country it was not required, and admitted the right of the tenant to compensation. Thus, at a Gloucestershire meeting, Earl Bathurst said :—

"The landowners were determined to do their duty. They were quite alive to the fact that property had its duties as well as its rights, and if they failed in the performance of those duties it would be for want of means to carry them out according to the requirements

of the public. He contended that in the face of the present good understanding between landlord and tenant, the interposition of Parliament—as far as this country was concerned—was not required. Tenants had their rights, landlords had their rights, and labourers had their rights; but they were the rights which the law gave them and no more. He ridiculed the idea that after the expiration of a lease there was a fixity of tenure. He agreed that the tenant had a right to demand compensation for improvements, indeed, he held such to be an equitable right.”

And, as Mr. Dixon shows in his book, in almost all the counties of England local customs secure such compensation to the tenant. It is otherwise in Ireland as a matter of general law or general custom. It is only so settled in Ulster, by virtue of a local custom (which however throws the burden of compensation on the *incoming tenant* and not on the landlord), or upon the estates of good landlords, like Lord Dufferin or Lord Bessborough, who either give leases or compensation. The Earl of Bessborough at a public meeting said :—

“ We every day see something connected with the land question brought forward, and sometimes schemes are introduced which make me doubt if I shall be here for the rest of my natural life. If I were obliged to leave I think I should be regretted. Well, whatever change does take place, I trust that nothing will occur to interfere with that cordiality and friendly union that exists here, and which, I trust, will continue to exist to the close of our lives. I have endeavoured to do what I considered to be my duty in the position in which I am placed, and I have been ever met by my tenantry in a way that left nothing to be desired. I have found them industrious and reasonable, ready always to improve, and showing by their acts that they had confidence in me. I have tried to make every individual see that the capital which he puts into his farm, whether it was money or labour, which is the poor man’s capital, would be always protected, and that he would reap the full benefit of it. That being the case, I do not believe that in this district any desire exists for great and radical changes. But this I, for one, will say, that if

by surrendering any of those rights and privileges, which might be misused, the peace and prosperity of other parts of the country will be secured, I shall readily do so. I do not believe that the tenantry of Ireland in general have the slightest wish to get rid of those who are their friends, as I consider a good landlord to be to his tenantry. This I will say, that I firmly believe that by living together, as my tenants and I have done, we have shown to the world that the interests of landlord and tenant are identical, not, as frequently represented, opposite and hostile."

And no doubt it is so, and has always been so, where there are such landlords. And, for the most part, there are such landlords in England—men like Lord Grey, Lord Portman, or Mr. Sturt, all mentioned by Mr. Dixon as giving either leases or compensation; and if there were such landlords always or usually in Ireland—men like Lord Athlumney, for instance—there would be no land question. But unhappily it is otherwise, chiefly because, as Mr. Bruce, the Home Secretary, said, "Six-sevenths of the land in Ireland is owned by Protestants."

*The Times*, in one of its excellent articles, said :—

"It is admitted that many landlords believe sincerely that the power of summary eviction, though a power seldom to be exercised, is a trust confided to them for the good, not only of their own estates, but of their ignorant tenantry and the community at large. Probably few abuse it grossly, and most certainly the impatience of it among Irish tenants is mingled with revolutionary ideas, which, if adopted, must lead to anarchy. But this does not alter the fact, which no statesman can ignore, that equitable claims have been developed by this very shortsighted policy of landlords. A lease puts an end to all notion of title by virtue of occupation; but a tenancy-at-will, descending from father to son, and fortified by the expenditure of labour and money, with the landlord's assent, is the parent of expectations which gravitate towards fixity of tenure."

It was now sought to satisfy the tenantry of Ireland by the establishment of what is called Ulster tenant-right, by

which the *incoming tenant* pays for everything and the landlord pays nothing. The truth is, that even in Ulster the custom has far from carried out what was originally contemplated and intended by the authors of the settlement. An able Irish organ, the *Northern Whig*, observed, that of the tenant custom of Ulster, the origin of it is not so easy to determine as may be supposed. A number of tenant-farmers, who were recently questioned on the subject, gave different answers, but no satisfactory explanation, from which the *Whig* concludes that it was not that simple and logical process which some people imagine, and then observes:—

“No single system was rigorously carried out. There can be no doubt, however, as many of the Patent Rolls of James I. testify, that great estates were granted to favoured persons on the condition that they should give their tenants a real interest in the soil; that in general tenants-at-will were not recognised, and that a fair security of tenure to the farmers was one of the conditions on which different lands were granted to the landlords. It is obvious enough that in those rude times English and Scotch colonists would not have been induced to cross the sea and incur all the dangers of undertaking to cultivate a barbarous and hostile country without having some security that they and their children who should come after them would enjoy the rewards of their industry. They came over here to sow the seed. They fully expected that they and their descendants should reap the harvest. And this was the intention of the Government. This is obvious from existing documents. Some tenant-farmers still living have been told of a time when their ancestors cultivated the land with the implements of husbandry in their hands and guns hung at their backs. The landlords certainly felt it to be their interest to promote security of tenure.”

The writer argues that if Ulster tenant-right is to be made the basis of legislation, the custom will have to become a law, and a very strict law. A very liberal valuation will have to be placed on claims for unexhausted improvements. Sacrifices must be made by the landlord in the interest of peace and contentment. The mere limited recognition of a tenant-right



of 5*l.* an acre, as in the Bill of three years ago, "could not satisfy men who have a just claim to a much higher rate."

But what basis for legislation could be found in a custom which varies so much that, as the *Times*' Commissioner says, in some places it is five years' and in others twenty years' purchase. Moreover, in a twenty years' purchase how great an approach is made towards fixity of tenure! Twenty years' purchase would be the price of the fee simple. Thus we see that, as Lord Portsmouth observed, such compensation would not pay, for the landlord would prefer perpetual tenancy, with periodical revaluations.

The truth is, that to the most intelligent observers it has appeared that in the great matter of tenure of land, the general law is at variance with, or does not at all events sustain, the customary right as recognised in fact, so that it is felt that the customary right, not based upon any certain general law, rests on an unsafe and uncertain foundation. Thus the *Times*' Correspondent observed:—"In the great matter of landed tenure, law, in theory, is at issue with fact and right in Ulster, as in the rest of Ireland. Here, as in the other parts of the island, law declares that a landlord is an absolute owner, though his estate may be subject to claims which morally abridge his rights extremely, and, in the face of the strongest custom, it will sanction his abolition of those claims, and will even give him facilities for the purpose. Abstractedly, therefore, it would appear as if the tenant of the North were in as bad a plight as his Southern fellow—nay, in a worse plight, inasmuch as his tenant-right often far exceeds in value any equity which may belong to the other. We know, however, that, in fact, the difference between the two is immense; that the tenant of Ulster usually feels himself secure and entitled to a real property in his holding, while the tenant of the South has no such conviction, and too often acts as though his tenure were a mere precarious annual possession. The simple reason is that, in the one case custom, acting with the force of local law, and resting

upon the happy traditions that unite the landed classes of the North, does really restrain the law of the land, and almost always vindicates the rights of the tenant; whereas, in the other, such a guarantee is wanting, and the tenant is left comparatively defenceless, unless he chooses to have recourse to agrarianism as his only safeguard. In the one case an *imperium in imperio* is created with all but controlling power; in the other there is no such salutary check, any check there is is feeble or bad; and the result is that the general law is much less impeded in working injustice." This implies that the general law does injustice, as it manifestly does.

Nor is this all. The custom, itself, is open to great doubts, and the *Times*' Commissioner observed:—

"It is obvious, too, that Tenant Right in its existing state contains the germs of serious and even perilous dissension, though the custom usually prevents their appearance. A landlord, influenced by the law and his interests, is apt to consider the Right as a parasite from which his estate ought to be set free; a tenant, looking from an opposite point of view, thinks of the Right as of a most sacred property—in all respects a part ownership in the soil. Their notions accordingly may conflict, and law being on the side of the landlord, he is tempted to carry out his ideas, and to assail or weaken the tenant's position, though, as I have said, as a general rule, the custom prevents injustice or discord. Occasionally, however, some wrong-headed person will violate the usage even directly; and I have been informed of instances within Antrim and Down, in which Tenant Right has been practically annulled, by a raising of rent inconsistent with it, or by eviction without compensation. When such cases occur, the serious mischief of leaving the Right in its actual condition becomes strikingly and painfully apparent. The tenant's property is inevitably confiscated, for his Right—which, in the opinion of the country, is a valuable interest, and, in numberless instances, has been made the subject of lawful disposition—is destroyed by a perversion of law; and all the improvements he may have added to the land, which the Right alone, as a



rule, protects, are lost in the general disaster. Such a proceeding in truth is almost worse than anything which can occur in the South, inasmuch as the rights of the Northern tenant exceed usually those of his Southern fellow, and if, fortunately, agrarian crime has not followed in recent times, this is because such doings are so rare, and general opinion so condemns them, that their evil influence has not been developed. Moreover, two or three cases of this kind, nay, even the rumours of such cases, have the effect of creating great discontent; and had I not witnessed such things in the South, I should have been surprised at the evidences I have met of dissatisfaction among Northern farmers, who actually had little or nothing to complain of, yet felt themselves injured because the Tenant Right of some distant equal may have been invaded. Not a few of these men have declared to me that they felt insecure, that their Tenant Right was an inadequate protection, that they too had a real grievance, and differing, as the great majority do, from the corresponding class in the South, they sympathise with them on the Land Question."

It is not to be wondered at, therefore, that the current has run strongly towards fixity of tenure, and it is observable that the *Northern Whig* went on to suggest something of the sort, and hinted that fines for such perpetual leases would only be fair, while on the other hand such perpetuity of tenure gets rid of all difficulties as to compensation. On the whole, therefore, it appears naturally enough, in the course of discussion, to have swallowed up all other plans. Mr. Butt, who at first went in for sixty years' leases, now is for perpetuity of tenure, which, however, is capable of any degree of fair modification.

The *Times*, in publishing Mr. Buxton's letters on the question, introduced them by some observations, pointing out how the new law developed into security if not fixity of tenure:—

"We publish a letter from Mr. Charles Buxton on the Tenure of Land in Ireland, which may be accepted as an indication of the stage to which speculation has advanced. Mr. Buxton claims to be

heard as the holder of Irish land under an indefeasible Parliamentary title granted by the Encumbered Estates Court ; but this position, which might excuse, if not justify, the strongest assertion of the rights of ownership, has not prevented him from studying the matter with the impartiality of an outsider. He goes so far as to declare, at the outset of his letter, that he no longer holds it necessary to prove that "security" as distinct from "fixity" of tenure must be granted to the Irish tenant. We entirely agree in this judgment. There will, of course, be persons insisting to the end that it is unnecessary and inexpedient to alter the existing relations of landlord and tenant in Ireland, but for practical purposes it may be assumed that the Irish tenant will shortly receive some sort of security in his holding."

The only question, as Mr. Buxton said, was what plan should be adopted. He rejected Mr. Caird's, and also the Ulster custom ; and the *Times* observed :—

"We agree with Mr. Buxton in rejecting Mr. Caird's suggestions. Mr. Caird proposes to fence around the landlord's powers with such conditions that he would practically be stripped of all control, reasonable or capricious, over his tenant, while the tenant would still be so far theoretically subject to his landlord that he would retain the sense of insecurity. It is true, indeed, that Irishmen have already rejected Mr. Caird's proposals from both sides, and we fear we must treat them, as a whole, as an impossible solution of the question. We dissent, as we have said, from the grounds of Mr. Buxton's condemnation of the proposed extension of the Ulster custom. He thinks he proves to demonstration that this extension would be a flagrant confiscation of the landlord's property."

The *Times* argued against this view, and upheld the Ulster custom, but its own correspondent had pointed out that it was impossible to define what it was, that it varied in different counties, and that it could be got rid of by arbitrary eviction, and that it was greatly on the decline. To this may be added that it is after all no adequate protection. He says :—

"A tenant who has paid 20*l.* an acre for a farm, legally a mere

tenancy-at-will, has bound himself in a heavy recognizance to obey the injunctions of a landlord, who can, if he pleases, destroy his property ; he is pledged more or less to submission from the consciousness of what authority may inflict. And though the custom is strong enough to secure the tenant in the great mass of cases, and though it has made him a free man compared to his fellow in the South, it does not save him from this sense of subjection ; and Tenant Right, unrecognised by law, has been found to be a powerful instrument to uphold the landlord's influence. This has repeatedly been shown in elections and other political contests."

And after all, even assuming the custom valid, and legally binding, as it may be and usually is—a custom between incoming and outgoing tenant, not as against the landlord, as it only affects him indirectly, not at all preventing him in point of law from evicting his tenant at the right termination of his tenancy, or raising his rent—it is a very indirect and uncertain substitute for legal security of tenure. Thus the *Times'* Commissioner observed :—

"It is, however, when we come to consider tenant-right and these analogous equities with reference to our legal system that the resemblance between them becomes most striking, and most distinctly challenges attention. In different degrees these common claims of the Irish tenant tend to engraft an interest in a landlord's estate derogatory from absolute ownership ; in the case of the tenant-right of Ulster, an interest of a very decided kind ; in the case of the looser equities of the South, an interest less clear or less recognised, but, notwithstanding, usually respected. This interest, however, although it conflicts directly with a landlord's legal rights, is not, either in the North or the South, protected by the State ; and as a Southern proprietor may ignore any equity of his tenant in respect of improvements or of money laid out in the purchase of good-will, so a Northern proprietor, as a matter of law, may extinguish the tenant-right on his estates, either by unduly raising his rent, by a notice to quit, or by eviction, assuming of course, as generally happens, that legally his tenant holds only at will."

What would be the value of such a custom as the basis

of legislation? Moreover, some tribunal with compulsory power would be necessary. This was shown by a correspondence between Lord Portarlington and Dr. Taylor. The noble lord wrote :—

“Now that the excitement of tenant-right meetings in this part of the country has somewhat subsided, I feel that as a landlord I have some claim to learn from yourself, as having been chairman of one of the principal of these meetings, and also as one who is known to hold wise and moderate views on the question of landlord and tenant, what we landlords are to understand to be the real meaning of the words ‘fixity of tenure,’ used so constantly both at the meeting presided over by yourself, and also at the other meetings held on this subject in other parts of the country.

“If you remember, the words always used up to this year as embodying the fair demands of the tenant-farmers of Ireland were ‘security of tenure.’ Now they are changed to ‘fixity of tenure.’

“Does the latter term simply mean the former? If so, I as a landlord can most heartily join in them, and will willingly give my humble support in the House of Lords to any measure brought forward by Mr. Gladstone’s Government by which this may be secured to the tenants.

“But if ‘fixity of tenure’ really means (as in England it is understood to mean) the handing over the property of the landlord to the tenant, subject to a mere rentcharge to the owner of the soil, then I say such a scheme deserves the reprobation and strenuous opposition of every honest man in the kingdom. I feel certain no Government would ever propose such a measure, or any Parliament be found to pass it. I feel certain, moreover, that no such idea ever entered your own mind while presiding at that meeting in Maryborough. If so, I quite join with you in believing that we shall see this vexed question satisfactorily set at rest for ever, and that with restored tranquillity and contentment the prosperity and resources of this country will become greatly increased and developed.”

To this Dr. Taylor replied in effect that he would be well

content with security of tenure if it could be got. But how (he asked) was it to be secured? He could not see, he said, how, unless it was by some tribunal of arbitration with compulsory powers. This seemed to be admitted on all hands, and so the *Times* wrote:—

“The necessary consequence of intervention on the part of the State between landlords and tenants in Ireland must be the creation of a power—it may be the ordinary Law Courts, it must more probably be a local and accessible tribunal—authorised to arbitrate between the contending parties. They cannot, when left alone, settle their differences peacefully and equitably. That is the foundation of the whole matter; and it follows that a third moderating authority must settle them for them. It does not follow that this third power, thus created and held in reserve, will often be called upon to act. We hope and believe that it would operate while actually inactive. If we had not this assurance, the prospect would be darker than it is; for it is scarcely conceivable how any community, above all a community so strictly agricultural as the Irish people, could subsist if the relations of the cultivators of the soil and its owners were constantly referred to the judgment of arbitrators. We must, indeed, face the possibility while believing that it will never befall us. Our conviction is that the sense of there being over both a power strong enough to compel recalcitrants to acquiesce in just judgments will induce the most perverse to listen to reason beforehand. It must be remembered that even now the actual cases of flagrant wrong are comparatively few and rare. The unwritten law of tenure abiding in the minds of the peasantry is understood and respected by the mass of the landlords, and the peasantry in their turn acquiesce in the fair claims of landlords. If this be the case, not only now, when any infraction of the understanding between the two parties is punished by an organization of revenge, but habitually, when the landlord is apparently unrestrained by any sanction, how much more sure—we may say how certain—it is that the creation of a legal provision for determining and enforcing the equities of tenancy will lead landlords and tenants to respect these equities without calling upon the superior power to enforce them! It will be enough that the authority is at hand and ready to be set in

motion to insure in almost every instance the effects it is created to secure, and that without any formal exercise of its power."

The plan advocated by the *Times* was a tribunal of arbitration, to entertain appeals from tenants against the arbitrary exercise of the power of eviction. This Mr. Buxton, we think rightly, deemed inadequate. The *Times* advocated it ably thus:—

"But now compare with the other schemes which Mr. Buxton discusses the proposal to erect Local Courts of Arbitration. We do not wish to prejudge a question Mr. Buxton half promises to examine, but we ask him to consider a few points connected with it. In the first place, it leaves the landlord in possession of his beneficent, while depriving him of his wrongful, power. The tenant, under notice to quit, or to submit to an increased rent, or to abstain from dealing with the land in any particular fashion, appeals to the Court, and the case has to be argued there. If it shall appear that he is farming properly, that he pays rent regularly, that the rent, according to certain prescribed principles, is a fair rent, in a word, that there is no reasonable objection to him as a tenant, he will be protected in his tenure or awarded a compensation for retiring. If, on the other hand, it appears that he is in arrears, or that he is exhausting the land so that there is no security for the rent of next year, or that he is sub-dividing, or that he is proceeding upon a plan of so-called improvement, which neither, from his own nor from the landlord's point of view, will justify the title, the landlord's right will not be suspended. In a word, the tenant would get not merely security but fixity of tenure, subject to the condition of fairly farming. The landlord would retain all reasonable control, and be secured in the receipt of his rental. Mr. Buxton objects that the plan would involve expense; but, in fact, it would work as a weapon always at hand, but rarely used. The Court would have to decide between grasping landlords and thriftless tenants. The mass of Irishmen would be left as they are, save that they would be covered with a shield of security from "felonious" conduct. The great merit of the proposal to erect Courts of Appeal may be briefly stated. At bottom it rests upon this, that there does exist what may be loosely described as a *law* of Irish tenure now, which is respected as a *law*



by the great majority of Irishmen. But this which we call a law is not such, for it wants the sanction of the Legislative authority. The proposal is simply to confer upon it that sanction. At present the sanction it has is the blunderbuss. It is admitted as a principle by landlords as well as tenants that the tenant has a moral claim to remain in possession as long as he does his duty by the land and pays his rent to the landlord, and, again, that the landlord has a claim to a periodical revision of the rental. Upon examination of the economic history of the country, the principle is found to be equitable and expedient, and suited to the conditions of its society, as might be inferred from the fact of its universal recognition. Is it not, then, the act of a statesman to give to it the sanction of the State instead of that of organized assassination? ”

On the other hand, Mr. Buxton argued against it with equal ability, thus :—

“ In addition to these three leading proposals is that one of which the outline was shadowed forth in your columns, viz. :—That tribunals shall be established with authority to receive complaints from tenants threatened with eviction, and, where they see fit, to ‘ protect the tenant-in-possession for a definite term,’ or, in some cases, to award him ‘ a lump sum as compensation for unjustifiable eviction.’ The advantages of such an arrangement seemed manifestly to be very great. On the other hand, it would be attended with heavy expense, and some doubt may be felt whether it would fulfil the essential condition of satisfying the Irish people. Who is to pay the expense of so protracted and difficult an inquiry? But, say that the arbitrator’s arbitrators—those to whom he has delegated his decision—report to him that the tenant does farm badly and ought to be removed. Then comes the question, shall compensation be given him for his occupation-right? If so, how much shall it be? But I might go on all day with the perplexities that may—that almost certainly must arise. I will, however, add but one query more. I want to know whether the State is to support the wife and children of the arbitrator, after he has met his too probable fate, from those tenants to whose eviction he has consented? . . . Again, is there solid ground for hoping that the Tribunals of Arbitration would be accepted in Ireland as a substitute for direct legal security

of tenure? I noticed that when Lord Portarlington threw out that very suggestion, the *Freeman's Journal* (than which no paper in Ireland stands higher) and other newspapers at once replied, 'Yes, but what about security of tenure?' We must not suppose that because this plan would harass the landlords it will, therefore, be embraced affectionately by the tenants. Look at the position in which it would leave them. They have risen almost as one man to demand, with intense earnestness, that they shall have security in their holdings. The Liberal party has virtually pledged itself to give it them. Yet, after all, they will find that security in their holdings, even for a time, is to be denied them; that tenants-at-will shall be tenants-at-will still, but that, henceforth, the tenant who receives notice to quit shall be allowed to appeal to a tribunal of a perfectly novel kind, one, therefore, of whose fairness he has had no experience, composed, perhaps, of unknown strangers; guided by canons of which he has no conception; and he will have to prove to the tribunal that his landlord is not justified in attempting to remove him. And how is he to prove this? The landlord, of course, will resist his plea, and will do so, no doubt, through his man of business, probably a solicitor, with a train of witnesses at his elbow, to show perhaps that the tenant had neglected his farm, or that his removal was necessary to some plan for the improvement of the property. It is unavoidable that the tenant, in resisting all this, must incur expense, to him, perhaps, almost ruinous."

Mr. Buxton, having thus argued against the plan of arbitration merely by way of appeal against eviction, propounds his own plan, as more simple and effectual:—

"If these considerations be fully weighed, I think it will be felt that, while any plan which leaves it to the option of the landlords to give security of tenure or not would fall too short of the tenants' demand, and would not effect any lasting settlement of the question, or bestow tranquillity on Ireland; on the other side, the Ulster scheme would be intolerably hard to the landlords, and pernicious to future tenants; in fact, that it would be a gift, at the expense of those two classes, to the existing occupiers. . . . But now, for a moment, contrast with this tangled thicket of perplexities the perfect simplicity of the rival scheme, under which there would be



no arbitrations, no valuations, with their uncertainties and their enormous unavoidable expense; but every tenant would be a leaseholder under covenants of the simplest kind, laid down by Act of Parliament; every landowner would know the exact limits of his power. The primary question, whether security of tenure is to be given or not, is altogether a separate one. In this discussion I proceed on the assumption that we are willing to face these and other evils, and that for high reasons of public policy the Liberal party desires to give security (not fixity) of tenure, and that now the immediate question is, which of the proposed plans for bestowing it will prove to be the most just and the most effectual? Now, this being our postulate, the proposal for which I have attempted to plead would at least have this merit, that it would act upon it in a perfectly direct and straightforward manner."

His plan was, that there should be a presumption in favour of a long duration of tenancy, say forty or sixty years; the onus being on the landlord to displace it. This, he said, would really give security of tenure.

"One thing I rejoice to observe—namely, that the respective advocates of these two schemes are perfectly at one in their fundamental ideas. This is agreed on both sides, that 'the landowner in Ireland must henceforth be disabled from evicting a tenant at his mere whim and pleasure;' and, as you add, 'the real point now is, in what way and to what degree shall this security of tenure be enacted?' This, then, is our starting point. We are going to give security (not fixity) of tenure to the Irish tenants. Of course, we are going to give them not an illusory semblance of security, but real *bonâ fide* security. It is essential that in studying this subject we should lay hold of that fundamental idea with the strongest grasp."

The objections to Mr. Buxton's plan were stated with most ability by the Earl of Airlie, who argued it thus:—

"It is one of the radical vices of Mr. Buxton's proposal that the same rigid rule is to be applied, without the possibility of modification, to farms of all sizes and of all kinds, large or small, grazing or arable; to all tenants, thrifty and industrious or idle and im-

provident ; to all landlords, good, bad, and indifferent. One instance more. Nothing, it is well known, tends more to enhance the value of certain descriptions of land than plantations judiciously laid out, and this altogether apart from the value of the timber. The shelter they afford to stock is often a consideration of paramount importance. But under the proposed system of compulsory leases it will be impossible for a landowner to form plantations of this kind without, in many instances, obtaining the consent of a large number of occupiers, from each of whom it may be necessary for him to take a bit of land. Those who know with what tenacity an Irishman clings to every fraction of an acre in his occupation will be best able to judge what chance there will be of improvements of this kind being carried out if landlords are to be compelled to give leases to every occupier of three years' standing. I have brought forward some instances to show how these compulsory leases will operate in depriving landowners of the power of improving their estates. But, perhaps, that is a question not very much worth discussing, as the landlord will have but little inducement to make improvements of any kind. Few men will desire to sink money in an investment which will yield them no return for a period of thirty-one years. For my part, I cannot imagine any scheme better calculated to foster absenteeism. The landlord is to be divested of all power ; he is to be forcibly relieved of all responsibility ; he is to be reduced to a cipher. Why should he continue to reside on an estate in the management of which he cannot possibly take any interest ? It appears to me that the arguments, both political and economical, against Mr. Buxton's proposal are absolutely overwhelming."

It could not but be observed, however, that the Earl of Airlies' objections could be applicable to any long leases, although most leases are granted in England and Ireland by the best of landlords and with the best results. Here let us notice a fallacy fallen into by an able journal, the *Pall Mall*, which, in one of its articles on the subject, said:—

"Fixity of tenure would ensure slovenly tillage. It may not do so, and apparently does not in Belgium, France, or Hindostan ; it almost invariably does so in Ireland."

Upon which Colonel Mure at once wrote to correct this erroneous impression by pointing out that fixity of tenure did not exist in Belgium; and then he fell into the similar fallacy of urging that tenancy-at-will was consistent with good cultivation. He wrote:—

“First, fixity of tenure, as between landlord and tenant, does not exist in any part of Belgium. In that country the land is, for the most part, let in leases of three, six, or nine years, the period being regulated, more or less, by the rotation of the crops, thus, to a certain extent, following the principle advocated by Mr. Caird. In one district of Flanders, the Pays de Waes, which is the extreme type of *la petite culture*, the soil is cultivated almost exclusively by tenants-at-will. Throughout the rest of Flanders, where the subdivision is most minute and high cultivation prevails, four-fifths of the land is tilled by tenant farmers. In Luxembourg and the Ardennes, where much of the land is unreclaimed, and the existing cultivation is of the most elementary and wasteful description, the proportion is almost exactly reversed. Throughout the kingdom about seven-tenths of the land in cultivation is in the hands of tenants. The above calculation excludes moorland and forests, the greater part of which belongs to the communes. In the case of leases the law lays down no statutory notice previous to eviction, except such as is provided by local usage. The tenant-at-will, in the Pays de Waes, is subject to eviction, without any intimation whatever, up to the last moment of the agricultural year. In the different provinces the reimbursement of the outgoing tenant for manure and seeds is regulated by usage, the observance of which is made compulsory by law. Ulster tenant right, *i.e.*, the purchase of goodwill by the incoming tenant, is unknown. Secondly, far from tillage by proprietors ensuring good cultivation, the result is exactly the reverse. It will be found that in Belgium the quality of the husbandry is in exact ratio to the cultivation of the land by tenants and owners, the figure of merit being highest where the land is let to tenant farmers, as in the two Flanders, Brabant, Hainault, Antwerp, and Liège, lowest where it is cultivated by the proprietors, as in Luxembourg, Limbourg, and Namur. Is it not a remarkable fact that the Pays de Waes, where tenancy-at-will, and, as I am prepared to prove, its

attendant evils, largely prevail, is so highly cultivated that it has received the appellation of the 'Eden of Belgium'?"

But this mode of arguing is utterly fallacious, in confounding law with fact. In this country tenancy-at-will is usual in agricultural tenancies, but then the custom is to continue such tenancies unless there is some fair reason for terminating them. And then Mr. Dixon, in his "Law of the Farm," points out that in parts of England where there are no leases the same farm is occupied by tenants of the same family generation after generation, for century after century. But he also points out that in other parts of England there are leases, and that cultivation is best where there are either leases or customary tenant right. No one who has looked below the surface can suppose that actual insecurity of tenure is compatible with good cultivation. Custom often modifies law. And thus it is in this country, where, although in strict law the farmers are mere tenants-at-will, yet they are practically continued in those tenancies to the end of their lives. Thus it is with some parts of Ireland, as the *Times'* Commissioner says:—

"The classes connected with the soil in this county (Fermanagh), which have shaped its destiny, and given it its social form, have for centuries lived together in goodwill; and, in the relation of landlord and tenant, have treated each other with mutual regard, have considered their respective rights and duties, and have even extended the gracious usages which have been the fruit of this state of things to those once in a thoroughly subject position, and still widely separated in race and religion. Society, accordingly, has grown up under kindlier and more happy auspices than in less fortunate districts; and the great relation of owner and occupier of the soil having been placed on foundations comparatively sound, security and progress have been the consequence."

Where it is so there is the less practical necessity for any alteration of the law by legislation, though it is questionable whether it is a healthy state of things, that which leaves

the cultivation of the soil legally at the mercy of the landlord. At any rate there is, however, no great practical evil, though it has been observed by English judges that such a species of tenancy is contrary to the ancient policy of the law.\* But where it is otherwise, as it is in most parts of Ireland, the evil is one which calls loudly for remedy, and will no longer admit of delay. We rejoice that Parliament is to be called upon at once to remedy it. And as the discussion of the subject will necessarily open up great questions, and involve the whole relation of landlord and tenant, it is as well that there should be a history of the law on the subject, with a view to show what aid law may afford in legislation.

This we understand to be the scope and object of Mr. Finlason's work. He has faith, it appears, in the historical method of solving great problems of legislation, and appeals to history upon this. He insists that history shows that from the earliest dawn of regular law in this country perpetual and inheritable tenure was the rule; and that it became obsolete only on account of the extreme inconvenience of such tenure at fixed rents, when those rents became merely nominal. A rent of four shillings at the time of the Conquest was something substantial, and even as late as the reign of Edward IV. it was the price of a good horse, equal to 20% or perhaps 40% now. But in the time of the Tudors such rents began to be inconsiderable, and soon became utterly nominal, as we see by the old customary freeholds at rents of a shilling at this day. Such tenure, therefore, ceased, except in manors, where the provision for *finés* made up for the decline in the value of rents, and tenants had to agree from time to time to fair rents, and to pay fines for renewal of tenancies. Leases for lives, often renewable for ever, upon similar terms, succeeded to the old inheritable tenancy, and in course of time the customary yearly

\* 2 W. Blackstone's Rep. 1174.

tenancy, continued generation after generation, became, on account of its convenience, most general.

In this historical view of the subject, Mr. Finlason thinks he sees the key to the solution of the question, and his view certainly in substance agrees with that of the most temperate advocates of the tenant's interest in Ireland or England. He insists upon retrospective compensation as a means of enforcing perpetual tenancy, or, where the tenancy is to be granted to a new tenant, he hints at premiums or fines by way of consideration. He supports his view by reference to the Roman law as established in this country, and by the local customs, which he says embody it, and he appeals to Mr. Dixon's book in proof of those customs. On the whole, the work is likely to be of interest and use in the discussion of the question.

The most interesting aspect of the question, as we said at the outset, is its bearing upon the subject in England, and the deepest interest is taken in it. At an agricultural meeting at Wenlock, a farmer said:—

“The question was not one that affected the farmer simply, but the country at large, since no man in his senses would invest a large amount of his capital in the improvement of land so long as he had no security for its return: and the result was that many farms were but indifferently cultivated, and consequently much food was lost to the nation. His idea was that a legislative enactment giving the tenant compensation for unexhausted improvements was necessary, and he would move, ‘That it is necessary for the encouragement of a better cultivation of the soil that legislation should be obtained to give to the tenant compensation for unexhausted improvements.’ Colonel Corbett, M.P., testified to the ability with which Mr. Davies had brought the matter forward, but considered that leases would be more generally liked by both landlord and tenant than the plan proposed, and he did not see any difficulty in the way of granting leases. In his opinion the objection to leases was greater on the part of the tenant than on the side of the landlord. He (Colonel Corbett)



had repeatedly offered them, and could not get his tenants to take them. He thought that no tenant could work as well under a Tenant-right Bill as under a lease, as in the latter case he would know how many years he had to depend upon to recoup himself for his outlay. After a lengthy discussion, in the course of which the Chairman showed that some years ago it was the custom in Salop to grant compensation to a tenant for unexhausted improvements on his leaving a farm, which is now the practice in Lincolnshire and Kent, and advised that, instead of asking for legislation on the subject, the old custom by common consent be resorted to, the following resolution was carried:—‘That it is necessary for the encouragement of a better cultivation of the soil that legislation should be obtained to give to the tenant compensation for his unexhausted improvements in the case of buildings and drainage, the landlord’s permission having previously been obtained.’ A vote of thanks to the Chairman closed the proceedings.—*Birmingham Daily Post*.

There was another similar meeting, at which the Earl of Harrowby and the Earl of Lichfield were present. These things are significant of the deep interest taken in the subject in the country, both by landlord and tenant.

Some of the arguments, even of Liberal members, against permanence of tenure, are obviously fallacious—confounding tenancy with property. At Ipswich Mr. Adair thus alluded to the subject:—

“He said he had some connexion with Ireland, and he would tell them what he really believed to be the case in respect to Ireland generally. It had been said that all the improvements which had been made in that country had been made by the tenants, and never by the landlords, and that, therefore, the suffering tenant must have the protection of the law against the exactions and harsh treatment of his landlord. Now, that was not the case, however much it may have been, and even then only with some qualifications in years gone by. He alluded to the Encumbered Estates Court, and with reference to the evictions said such a process was by no means easy. It



seldom occurred, except for non-payment of rent, and he thought he was right in saying that in the last year there had been 1400 evictions, or one in every 457 tenancies, which had been for non-payment of rent. If a landlord wishes to evict a tenant he has to give notice to the relieving officer of the union that he must prepare to receive the evicted man and family into the poor-house; he must also give notice to the sheriff, and he is also bound to give notice to the tenant before he is evicted. What he might call fanciful evictions, apart from non-payment of rent, were quite the exception, and not the rule; but he did not mean to say that it was not the duty of the Government, as far as they possibly could, to protect the tenant from capricious evictions. He was sure the Government Bill would provide some means of affording protection against such evictions, at the same time that it would also respect the rights of the owners, and protect them in the enjoyment of their property. He regretted the course pursued by the agitators, who, he said, had rendered it exceedingly difficult to approach the question and arrange the details. They had been preaching up a fixity of tenure, by which, so long as a man pays his rent, which is to be variable, and regulated according to the price of provisions, so long shall that man have an indefeasible right to the land he cultivates, and shall, in fact, come in and supersede the proprietor in the right to maintain and enjoy that land. No one would consent to hold land on such an understanding, for the nominal owner would cease to be the proprietor, and would have merely a rent-charge upon the land."

Now, this was the entire error, for tenancy, even in fee, is quite consistent with the property being in the landlord. And here the history of the subject comes in, and is of use. Here we have an intelligent Member of Parliament apparently utterly unable to reconcile ownership in the landlord with permanent or perpetual tenancy in the occupant. Yet history shows that such was the universal system in this country for ages. The free agricultural tenancy was inheritable, and hence the term "freehold;" hence also "freeman" and "freeholder," now synonymous phrases. Tenancy-at-

will, or leases for years, was deemed only fitted for serfs. At this moment manorial tenancy is inheritable, only with the condition of fines on descent or alienation. Yet the lord is not less the owner. Nothing is more clear than that the freehold estate is in the lord in such case, though the interest is in the tenant. Such is the scope of Mr. Finlason's book. His idea is that of perpetual tenancy purchased by premiums or fines, *from which the compensation for past improvements is to be deducted.* Thus he seems to have come to the same conclusion as Mr. Caird, who, at pp. 27, 28, says:—

“If Ulster farmers have hitherto found it profitable to pay a fourth or a third of the fee simple value for the mere right of occupancy, how much more gladly will they enter into an arrangement which in thirty-five years would make them the owners of their farms, at an annual charge not much greater than they are paying for their present uncertain tenure. For example, a tenant-right farmer has a farm of forty acres, the market value of which is 30*l.* an acre, equal to 1200*l.* This will yield in rent at the ordinary rate of purchase in Ireland:—

“Four per cent. on 1200 <i>l.</i> ... ..	£48
--	-----

“Instead of this he will pay to the Government, or to those holding its Guaranteed Land Debentures, 5 per cent. for thirty-five years ... ..	60
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—

“Which is an addition annually of ... ..	£12
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“But he will have a claim for his tenant-right, which, if equitably arranged between him and the owner, will more than clear off this annual balance, and leave him a positive gainer from the first by the change.”

There seems a general agreement in some principle of this kind. The only opponents of it deny the right to compensation, and claim the property with all improvements for the landlord, *without payment for them.* This, however, Mr.

Finlason says, is contrary to the old law of this country, which has been extended to Ireland, and he insists that it has only been by wrongful perversion of the law that the landlords in Ireland have evaded compensation, or thrown the burden on the incoming tenant. He cites copyhold tenure as an *ancient* precedent and the modern land settlement as a *recent* precedent. And he contends that legislation, to secure the tenant retrospective compensation for all past improvements, and to enable him to set off the value against fines or premiums for perpetual tenancy, will be only a restoration of ancient law and a restitution of ancient right.

## ART. V.—THE CHARTERS OF THE CITY OF LONDON.

BY MR. SERJEANT PULLING.

THE charters of the City of London are generally identified with the history of the British Constitution; and yet there is hardly any subject of such consequent interest on which the world outside Guildhall have so very indistinct ideas.

We have all read of the hard-fought battles of old times between the Crown and the citizens of London respecting their ancient rights and privileges, and of the concessions which from time to time the Norman race of kings were forced to yield to the metropolitan City by way of recognition of those rights; and we all know that it was an express provision of the Great Charter that the City of London should have all its ancient rights and liberties. The more definite grants which the sturdy citizens wrung from the Crown during the York and Lancaster disorders, the good round sums by way of consideration for further concessions which found their way from the City coffers to the empty

royal exchequers, the very elaborate bargains which Guildhall had to make with the Tudors and the Stuarts, the worse than questionable character of some of these, and the effect of the judgment of forfeiture of the City charters, in bringing about the national Revolution of 1688, and the solemn Act of the first Parliament afterwards in restoring all the City rights and privileges, are recorded in every history of England.

That there must be something of more than ordinary importance in charters thus dealt with few would be inclined to doubt. Sceptics are effectually put to confusion when they see how much is made of them in high places at this day: how on such occasions as Lord Mayor's day or other municipal display when Guildhall reigns master of the situation, the judges of Westminster Hall vie with the law officers of the Corporation, and illustrious princes and statesmen vie with one another, in grandiloquence, whilst dilating on the time-honoured franchises conferred by the glorious charters of the great City of London: how intelligent foreigners are led to believe that the Lord Mayor of London is a personage far above the Lord Chancellor, and how the candidates for municipal favour tell the smaller world assembled at the wardmote and the various City halls, that they are prepared to do battle against all comers, to uphold and maintain inviolate institutions and franchises thus so bravely gained, and so highly prized. In the general reform of our municipal corporations, which was effected in 1835, the ancient Corporation of the City of London was deliberately left untouched; and it is not a little remarkable that with all the competition in our days between rival reformers of the two great parties in the State, the task of reforming the Corporation of London continues to be deemed too formidable for any statesman *in office* to undertake. Assailed, as it has been, for nearly half a century by reformers out of office, the civic Corporation is, for some cause or other, always treated with equal forbearance by

Liberal and Conservative when in actual power; condemned over and over again by solemn verdict, Guildhall seems always to have her sentence postponed, *sine die*. Newspaper writers and platform orators may pronounce her doom, but we have no authentic information as to when she will be brought up for judgment, and she stands meantime on her good behaviour. Though we may be all aware of these remarkable circumstances in the history and present position of the City of London, very few persons have any distinct notions as to what are the peculiar reasons which thus leave the City altogether exceptional in our system of local government; what really are the privileges and franchises at this day of the citizens and their very ancient Corporation, and what are the actual provisions of those ancient charters by which they are either conferred or confirmed.

From the learned work of Mr. Norton,\* published forty years ago, while he held office under the Corporation of London, now republished, as we are informed by the learned author, by the express direction of the authorities at Guildhall, we can gather a great deal of information on these points. Mr. Norton gives us not only an interesting account of the history and progress of the City, but the actual provisions of the various City charters, with a great variety of information thoroughly elucidating them. The book contains much that is useful to the lawyer as well as entertaining to the antiquary and the student of history.

In this volume we see how gradually our metropolis outgrew its municipal institutions. We look back to London of old—a compact walled town of 723 acres, manned by sturdy citizens, crowded together in wooden houses, and the victims alternately of fire and pestilence, but ready to act on the

\* *Commentaries on the History, Constitution, and Chartered Franchises of the City of London.* By George Norton, formerly one of the Common Pleaders of the City of London. Third edition, revised. Longmans & Co. London, 1869.

defensive against all aggressors—lawless kings, freebooting barons, and foreign adventurers; and we compare it with the London of our day, extending over an area of 115 square miles, with as many princely palaces as the old City had of permanent structures, with a population of 3,000,000, and thousands of miles of streets and buildings; in fact a province of habitations, by far the largest and most important in the world; whilst the bounds of the ancient *City* still remain the same, forming a sort of district of the actual town of London; described by Mr. Norton as “a vast mercantile emporium or factory, rather than a place of general habitation,” the resort during business hours of the mercantile world, but at other times the residence only of an altogether inferior class, the trader’s workmen and servants, the watchmen and the police, the publican, the huckster, and petty shopkeeper.

In the charters of the City of London, which Mr. Norton brings under our notice, we see the various kinds of privilege which the ancient civic body from time to time obtained, and we are able to judge of their actual value at this day, and to see how gradually but how completely things have changed; how on the one hand rights obtained at great cost, and maintained after endless contests with the Crown, have in the course of time come to be valueless; and how concessions, almost trivial in their origin, have expanded to an extent in no way contemplated at the time they were obtained, and how, though Guildhall at this day derives its authority only from the comparatively insignificant section of the inhabitants of London to which we have already referred, it enjoys by virtue of these old charters possessions and power, greater than any other municipal body, or indeed many sovereign States, possess.

¶ The whole number of charters granted to the City of London seems to exceed 120, but many of these are mere repetitions, or confirmations on *insperimus*, of previous grants; and Mr. Norton gives us a most useful and reliable sum-



mary of the principal concessions. It is remarkable how very little is contained in any of them (except so far as they make out the title to the City revenue) of any practical value to the general body of citizens of London at this day.

The series commences with a charter from William the Conqueror, that the citizens of London shall be *lawworthy*, and protected from wrong. To use Mr. Norton's language,\* "it confers nothing new, nor does it confer any specific or distinguishing privileges, merely declaring that the Conqueror would not reduce the citizens to a state of slavish vassalage." The charters that immediately follow contain, for the most part, either general confirmations of the City franchises, or special concessions of personal exemptions to the citizens, of appreciable value at the time they were granted, but of no use at this day. There is not to be found among them any *governing charter* in the correct sense of the term, or any provisions making the local government of London *essentially* different from that of ordinary municipal towns—or in truth any concessions materially different from those made to the cities of York, Bristol, and Norwich, and twenty other corporation towns, dealt with by the general Act of 1835 for reforming our municipal corporations.

The early London charters, so far as local government is concerned, are, for the most part, confirmatory only of institutions previously in force. Thus the right of the citizens to elect their mayor is first mentioned in a charter of King John, but the office had really existed under another name, as portreeve, &c., for ages previously, and indeed it may be assumed that nearly all the municipal institutions of this ancient City had their origin in periods long antecedent to any royal charter.

Henry I. granted to the citizens of London to choose their own *Justiciar*, and a succession of charters from the time of Edward III. to George II. invested the mayor

\* Lib. 2, ch. 1, p. 258.



and aldermen of London with the powers and duties of Justices of the Peace. Mr. Norton refers to the incessant conflicts between the citizens of London and the Crown as to the limits which, by virtue of their various charters, were placed on the ordinary system of administering justice, and a great deal has occasionally been made of these concessions by zealous advocates for the City rights; but there was nothing in the charters to the City of London in principle differing from those granted to other municipal bodies, and practically they do not place the City magistrates on a materially different footing from that of ordinary borough magistrates. The system, indeed, of chartered justices has been generally abolished by the Municipal Reform Act. The aldermen-magistrates of the City of London however remain, and, with the exception of the anomalous provision which makes one London alderman in matters of summary jurisdiction equivalent to two ordinary justices, they have nearly the same judicial functions and perhaps usually administer justice as well as the majority of unpaid county and borough magistrates; that is, with the aid of well paid-professional men, expressly appointed to keep them clear of the many legal slips and blunders, from which in times past the great unpaid had so frequently to suffer, and a certain class of legal practitioners derived gain, in the shape of verdicts for nominal damages and heavy costs.

The charter of Henry III. conferred on the City of London the shrievalty of the county of Middlesex, and the duties, honours, and emoluments pertaining to that ancient office to this day devolve on the two citizens annually chosen in Common Hall to be *sheriffs* of the *city of London*; but the Guildhall accounts of our time show anything but a gain to the Corporation from this concession; and, in fact, from the evidence of persons who seem to have purchased experience in such matters, it seems clear that, neither the office of Sheriffs of London, or that of Sheriff

of Middlesex, is now productive of profit to any one except the various solicitors who, acting as under-sheriffs or their deputies, are said to derive a considerable balance after deducting the actual expenses from the official proceeds.\*

There are many other concessions in these charters, for the most part of little real interest for any but antiquarians.

A large number of the charters of the City of London contain provisions exempting the citizens of London and their goods from certain ancient tolls, such as bridtoll, childwite, jeresgive, and Scotale, the very names of which are hardly known at this day, all benefit from the immunity having been for many ages abandoned. Other charters in accordance with ancient custom confirm to the citizens certain privileges in law suits, which are practically of no use at this day. Such are the provisions in a charter of Henry II., in two from Richard I., and five from King John. Henry III. granted no less than nine charters to the citizens, four of them confirming afresh the various privileges thus already enumerated; but in no way affecting the constitution of the Corporation, or the civic government. Other charters conferred on the good citizens the privilege to hunt within the county of Middlesex, and elsewhere in the suburbs of London, a privilege to which the sporting citizens of the twelfth century probably attached great value, but which, in after ages, was productive only, to the good folk within the walls, of little else than ridicule, and the expense of keeping up an establishment, of which the only remaining relic is the office of *Mr. Commoner Hunt*, an official who, in a very remarkable garb, we believe, still shows himself at most of the Lord Mayor's feasts.

The rights derived by charter and otherwise which are at this day of substantial value to the Corporation of

\* See evidence of Mr. Wallis, Sheriff of London and Middlesex, before London Corporation Commission, 1853. Sec. 1355.

London, and, as far as the present system of municipal administration admits of it, of advantage to *the City* of London, consist of those which directly or indirectly contribute to the Corporation revenues, and on this subject much may be learnt by going back to the charters.

The ordinary revenue of the Corporation of London was officially reported to the Commissioners of Enquiry in 1853 to consist of no less than 222,840*l.* per annum, whilst the aggregate annual amount of the income of the various estates in which the authorities at Guildhall are directly or indirectly interested as trustees for express public or charitable purposes it would be impossible to fix at a less sum than 1,000,000*l.* sterling.

It may be interesting to trace the sources and growth of this vast revenue of the Corporation of London, and to see how far the City charters serve as their title deeds.

The rapid growth of the revenue of the civic Corporation is certainly remarkable. That the citizens of London were at all times a substantial body, capable of raising good round sums for the common good, there can be little doubt. The heavy contributions from the Guildhall coffers towards the exigencies of the State upon every occasion where an excuse for levying them could be made, prove that the resources of the Corporation were always great. The renewal of their charters from time to time, or the concession of fresh privileges, were generally made the occasion of such contributions, and when money could not be otherwise obtained, the reigning Prince not unfrequently honoured the City magnates by accepting sums by *way of loan*; and at a fitting opportunity, got the debt cancelled, making some new concession by way of consideration.

The Corporation by such means seem to have obtained some of their most valuable privileges. Thus Edward IV., in consideration of a past loan of 1923*l.* 9*s.* 8*d.* granted to the Corporation the right already referred to, of purchasing lands in mortmain, and a short time afterwards got a further

loan from Guildhall of 7000*l.*, and the royal borrower had to pay it off by conceding to the Corporation a number of offices or powers to intermeddle with the daily transactions of traders, which greatly augmented the City revenues at the traders' cost.

The offices which the Corporation of London, by virtue of various charters from the Crown, and by ancient custom confirmed by Statute, from time to time thus acquired, gradually came to confer on the City authorities a simple power of levying taxes on trade, of the same character as the ordinary customs duties. The authorities at Guildhall provided beams and scales, and weights and measures, and employed a small army of porters, meters, gaugers, &c., nominally to secure regularity in commercial dealings, but really to obtain a permanent revenue for the Corporation. The way in which the metage of coal and corn came first as an office derived from ancient custom, was converted into a sinecure by a charter of James I., and into a grievous tax by special Acts of Parliament, obtained by civic influence, has been so often commented on of late years that it is needless to refer further to the matter here.

The growth of the City estates in land, &c., is no less remarkable than revenue from other sources. Up to the fifteenth century it is generally supposed the Corporation possessed no actual property in land. A charter from Henry VI. granted them the common soils, purprestures and improvements, wastes, streets, ways, &c., within the City and suburbs, and in the waters of the Thames within the old limits of the City, and all the profits and rents to be derived therefrom, a grant which Mr. Norton disclaims as *a title to the actual property* in them.\* Other charters, before and after, granted to the civic authorities various unenclosed lands, &c., for public purposes; thus Smithfield, or Smooth field, was from a very early period civic property, for the

\* Lib. 2, ch. 6, p. 372.

purpose of holding a market as well as for a variety of sports; and Charles I., confirming the title of the City to all erections, and to the streets and waste grounds, granted further the tract of open ground then called *Moorfields*, and also expressly confirmed the City title to West Smithfield, with a proviso that these should not be built upon. For other public purposes, the City authorities at Guildhall obtained possession of valuable property, *e.g.* the land now forming the conduit mead estate, for the purpose of supplying London with water; but at this day it is no exaggeration to say that nearly the whole of the landed estate thus acquired is leased out by the Corporation to private persons, and that the direct revenue from these sources goes simply into the City coffers. The amount in the Guildhall accounts is put down at a sum exceeding 100,000*l.* per annum.

The various offices held by the Corporation in connection with the regulation and control of trade bring even a larger amount, though the cost to the City is small, and the value of the *services* which form the foundation of this large revenue is estimated by the commercial community at a very small figure, if, indeed, the interference of the civic officers can be treated as of any public advantage at all.

The charters of the City of London, therefore, in themselves serve at this day rather as muniments of title of the Corporation of London to a large corporate revenue, than as a code of regulations for the government of the City. So far, indeed, as they serve to keep up a system by which one small portion only of London has municipal institutions, to the exclusion of—if not at the cost of—the rest, they simply serve to keep up a great anomaly.

We have already referred to the anomaly which exists in the local government of London in its present state; the municipal institutions and large municipal revenue conferred by ancient custom, and such a number of charters on the

City of London, having come, by a concurrence of circumstances, to belong only to a part instead of the whole of the actual City.

This anomaly we cannot view as the legitimate result of the City charters. Indeed, looking to these charters as a whole we feel justified in saying that the rights and privileges, as well as the powers and duties, which they create or regulate, ought justly at this day to extend to the whole area of the metropolis. Taken altogether, the charters of London militate against the existing state of things. Many of the early charters, indeed, seem distinctly to point at an extension of the municipal area, and the subjection of the surrounding districts to the civic government, but the legal machinery adopted for this purpose seems to have been at all times sufficiently clumsy.

Up to nearly the end of the sixteenth century the whole of the metropolis was confined within the actual City walls. From an ancient map of London, dated 1560, we are able to vouch for this as an indisputable fact, the suburbs being almost devoid of buildings, with the exception of a few straggling houses leading up the Strand, and a few more round about Smithfield, and the open fields coming close up to the City wall, throughout almost the whole northern and eastern circumference.\*

As the space within the City walls came gradually to be regarded as too confined for purposes of residence, as the old habitations of wood came in the beginning of the seventeenth century to give way to buildings of brick, and habitations were sought for in the outskirts, the most clumsy contrivances were resorted to by way of municipal regulations for these new districts. The old City walls were left as the municipal boundaries, whatever course private enterprise might take in spreading the actual area of London. The City of Westminster, the town of Southwark, and a

\* See Mr. Norton's Book, p. 140.



hundred villages and hamlets, were gradually absorbed in the metropolitan province. The colossal London of our day was suffered to arise with no other foundation for its local government than that provided by the general law of the land, by the several authorities of the county, the hundred, the parish, and the leet.

The question of an improved system of regulations for the streets and sewers, &c., of any particular district was left to the mercy of mere local adventurers, availing themselves of the lax practice of Parliament in dealing with schemes for private Bills.

The evils of our unhappy system of private Bill legislation have been nowhere more felt than in the metropolis. It being always competent to small bands of adventurers in a district to obtain a local Act of Parliament under the pretence of local improvements, and to form a local board, and levy local rates to carry it into effect, London, as its dimensions spread, came to be divided into the most irregular patches, and to have inflicted on it many hundred distinct local Statutes, and nearly as many local boards, for this patchwork sort of local government.

The Corporation of the old City of London, meantime, instead of helping to establish system in the local government, contributed rather to bring about a chaos of legislation on the subject, which, to a large extent, even now exists. The success of the Corporation in resisting legislative interference has gradually produced evils of a very serious character to the metropolis. The Corporation, who have an official expressly appointed to watch all Parliamentary proceedings in any way supposed to affect the City of London, have hitherto generally succeeded in getting exempted from all legislative improvements to which they were inimical, by obtaining a simple saving clause in their favour, or obstructing the proposed plan altogether. The effect of all this has been to substitute for a real system of local government for the metropolis the mass of patch-



work legislation to which we have just referred, sometimes confining to single portions of London provisions which ought to extend to the whole; sometimes, as in the case of the formation of the docks, &c., abandoning great public works to mere private bodies; whilst the same bad principle has been adhered to in the legislative measures, doubtless promoted at the instance of the civic authorities.

The number of local Acts thus called into existence affecting various portions of the metropolis alone amounted, it is believed, when the Metropolis Management Act of 1855 was passed, to about 500. That Act created a great improvement, but a still greater reform would have been effected if the Corporation of London had taken the initiative, and by a timely concession agreed to the same principle being adopted in dealing with London as was followed thirty-five years ago in dealing with all the other corporate cities and towns in the kingdom.

The course followed by the Legislature in the Municipal Corporation Reform Act, so far as relates to those towns included within its provisions, was to bring all that would popularly be termed *the town* within the scope of the same municipal authority. The Municipal Corporation Commissioners, in their Report on the City of London in 1837, stated that they did not "find any argument on which the course pursued with regard to other towns could be justified, which would not apply with the same force to London, unless the magnitude of the change in this case should be considered as converting that, which would otherwise be only a practical difficulty, into an objection of principle," and the Commissioners go on to say that they are unable to discover any circumstance justifying the present distinction from the rest of London, of the small proportion of the metropolis at present comprehended within the municipal boundary. In the interval that has elapsed since this recommendation was made, nothing effectual has really yet been done to secure proper municipal institu-

tions for the metropolis. The Commissioners, who in 1853 inquired afresh into the subject of the Corporation of London, did not adopt the recommendation already referred to; and though we have since had a metropolitan Board of Works established, for regulating and controlling one important branch of local government, yet in other respects legislation has stood still. The cost to the rate-payers of the metropolis is not by any means diminished, and London is as much without a system of municipal government as ever.

During the many years that the subject of a municipal government for the metropolis has been under consideration, we have had many suggestions from men earnest in the cause of a salutary reform.

It is urged, in conformity with the objections stated by the Commissioners in 1853, that London is too large to be placed under a single system of local government, because the two first conditions for municipal government—minute local knowledge, and community of interest in local works—would be wanting; but it is a remarkable circumstance that, as if by way of entire refutation of this notion, within a year after the Report came out the Metropolitan Board of Works was legally established, and the inconvenience thus alluded to has not arisen.

The schemes founded on this assumption, therefore, must be received with some doubt, and we cannot think that the plan suggested in some quarters, of parcelling out the metropolis into districts, to be governed by separate and independent municipalities, would be beneficial. We go further, and say that if there is to be one system instead of a variety of systems of local government for the metropolis, the safest and wisest course to adopt would be to take up with the old municipal government of the City of London Corporation, subject it to some wholesome ordeal of reform, and spread the area of the municipal authority, with the municipal franchises, over the whole of London.

We rejoice to see that a feeling is now growing up that after all the schemes that have been proposed the simplest course is the best, and that the venerable fabric of the Corporation of London is quite as capable of adaptation to the wants of our time as that of York or Bristol, that by applying with some necessary variations the provisions of the Municipal Corporation Reform Act of 1835, the City of London may be made to embrace the whole of the metropolis, and the ruling body of the Corporation of London be composed of representatives, chosen, not as now from the narrow section of residents within the district of the old civic area, but from the inhabitants of the actual City of this day.

It is with no feelings of hostility we assert that the municipal representatives of this City are now in a false position. These gentlemen have, many of them, ably and honourably filled the places they hold in the Guildhall councils. Under an altered system many of them would be unquestionably elected for a far larger and more honourable area of usefulness.

The old Corporation of London in many respects is an admirable institution, and its upright system of administration has elicited the praises of nearly all who officially, or otherwise, have had to look into it. By distributing the business of local administration among permanent committees, the civic body succeed, both financially and otherwise, in getting through their work as well, if not better, than any municipal body in the kingdom.

By simply extending the field of operations of the admirable system of administration at present in force at Guildhall, by means of standing committees, there is really no part of the duties of the municipal government of the metropolis which could not be managed, at least as effectually, economically, and satisfactorily, by the reformed Corporation of London as by the present Metropolitan Board of Works, or indeed any other that could be devised.

The various boards at present entrusted with the different duties of municipal administration in the metropolis are not kept in operation without considerable cost, as the ratepayers well know. Were these all merged in the Corporation of London, the heavy items of establishment expenses must inevitably be diminished, and another great advantage would be gained. The expense, even of Corporation state and ceremony, if incurred for the whole instead of a part only of the metropolis, would not be grudged; but even for this purpose it is not likely that the cost of a Corporation for all London would be greater than that now maintained at Guildhall.

On every ground, therefore, financial and administrative, the extension of the municipal area of the City of London to the whole metropolis would be a gain to the ratepayers and the inhabitants of London. We believe that the better part of those who now hold municipal offices would have small cause to complain, and if sentiment is to enter into the consideration, such a destination for the good old Corporation of London must be viewed with satisfaction. With all the sneers at old Gog and Magog, with all the schemes of modern innovators, it would be a great thing to uphold an institution so time-honoured, and in accordance with Magna Charta and so many subsequent State-guarantees, to preserve to the *City of London* at this day all its ancient and legitimate rights, privileges, and franchises.

#### ART. VI.—THE NEW BANKRUPTCY ACT.

**T**HE Bankruptcy Act which came into operation at the beginning of the year is in all respects a most important measure, effecting as it does so many changes in the law, and purporting to give in but 136 sections the main outlines of a Bankruptcy Code. The new Statute appears

to give satisfaction in the commercial world, but it remains to be seen how long this will continue; we doubt whether its somewhat vague and often sweeping provisions will find equal favour among lawyers. Everyone has now grown so accustomed to revolutions in Bankruptcy Law that all astonishment has ceased, else some surprise might be felt at the fact that this branch of our legal system, though entirely created by Statute, has been since the days of Henry VIII., undergoing change after change, only to arrive at its present confused state. We have been for three centuries repealing, consolidating, and amending the various enactments that were for a brief time fashionable; but it is within the last forty years that we find the greatest activity in bankruptcy legislation. In 1831, Lord Brougham passed his Act, which established the Court in London, and introduced the seeds of our present system. He was hailed as a national benefactor, particularly by honest creditors and debtors; and his official assignees were considered to be a great improvement upon their predecessors, the trade assignees. Men compared the new Act with the old one, and found in it everything worthy of praise. Formerly, the creditor's assignee had kept all the money he could, and otherwise defrauded the estate; now, people said, we can rely on the honesty and proper working of the new official assignees. But the natural applause of novelty soon died away, and then came about the usual dissatisfaction. Creditors were particularly discontented with the limited power they possessed over the bankrupt's property, and so, amidst more applause, the Bankruptcy Consolidation Act of 1849 was passed. This great and comprehensive measure lessened the influence of the official assignee, and made many other important alterations. Then came the Act of 1861, putting the officials in a still lower place; while, by the last Statute, they are all abolished. Their popularity, which was so great in 1831, gradually declined until it seems to have entirely

departed; thus showing the influence of a kind of fashion upon our law-making in the place of that scientific consideration and arrangement which would have been more appropriate. One of the great aims in framing a Bankruptcy Act should be to deal justly with both creditors and debtors, and to balance equally their respective powers. The three later Statutes have not succeeded in doing this, but have alternately taken one side or the other. The Act of 1861 leaned so much towards favouring the unfortunate debtor, that creditors frequently lost even justice. Under the new Statute creditors are once more placed in a powerful position, and upon the use they make of this superiority will depend, to a very great extent, the success of the measure.

But there is another matter that, though it is of great importance, hardly receives equal attention. Proceedings in bankruptcy are all more or less judicial. They take their efficacy from this fact, and they should be carried on under the authority and supervision of the Court. Now, the extent to which this authority is to be exercised has always been a question of difficulty in bankruptcy legislation, and it has varied according to the opinions in vogue at the time of passing the different Statutes. In regarding this point we come back again to the assignees, for it is evident that the Court has always had greater power over an official than over a creditor's assignee. We have already observed the changes in this respect that have been made at different times, until, coming to the last Act, we find a trustee chosen and directed by the creditors, but also, to some extent, under the supervision of the Court. This trustee is very like a trade assignee with a new name, but he appears likely to assume a more official character. Should most trustees act honourably, and should the Court's power over those who do not be actively used, then one of the most difficult problems will have been solved, and the new Act become more likely to prove successful than



at present appears. But it should be remembered that the creditor's assignees who obtained so bad a character prior to 1831, had much in common with the new trustees; and that the checks given to the Court upon the conduct of the trade assignees under the Act of 1861, and but little used though often required, were in effect the same as those of the new Act upon the conduct of the trustee. It would be a far more grateful task to have nothing but praise for the Statute of last year, but the history of past Acts cannot fail to make us doubt whether this one will not imitate them, and prove a delusive failure. However, the Bankruptcy Act, 1869, will probably be the law for some years; and we will therefore proceed to inquire into its general effect and particular provisions, pointing out, meanwhile, the most important alterations it makes in the old law.

The first clause of much interest in the new Act is Section 6, defining the acts of bankruptcy, and giving other requisites of the petition. Adjudication upon a debtor's own petition is now abolished, being indeed no longer necessary, as it was only introduced, and afterwards extended to all classes by the Act of 1861, to give a means of getting released either from prison, or the probability of arrest under a *ca. sa.* The debtor, then, can only be made bankrupt upon his creditor's petition, though it may be presented by one or several, provided that his debt, or their debts together, amount to not less than 50*l.* Under the former Act a single petitioning creditor's debt must have been as much, but if two joined, the limit was 70*l.* together, if three 100*l.* The alteration now made is certainly an improvement, and although some have thought that one creditor for 20*l.* should be allowed to petition, it is difficult to see any theoretical or practical reason for such a reduction. The acts of bankruptcy given in this Section are necessarily very similar to those contained in the Acts of 1849 and 1861. Those affecting imprisonment



are no longer needed and are therefore omitted. By the first clause any conveyance or assignment to a trustee for the benefit of his creditors made by the debtor is an act of bankruptcy. Under the former Act such an assignment was protected if registered and fulfilling certain conditions which gave it efficacy. The two modes given by the new Statute as to liquidation by arrangement, and composition with creditors, render this protection no longer necessary; and as what were known as deeds of assignment and composition are now done away with—at least as to what we may call their judicial power—the making of any such deeds has become an act of bankruptcy. Clause 4 gives as an act of bankruptcy “that the debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts.” This is but the old declaration of insolvency under a new name, and was, we believe, omitted from the original draft of the present Act. Without it there would have been some difficulty in managing a friendly bankruptcy, but with it nothing can be more easy, for upon the debtor’s filing such a declaration, a creditor can, within six months afterwards, upon a debt amounting to 50*l.*, present his petition against him. There are various other provisions of minor importance that will be found upon referring to the section itself.

Section 7 gives a debtor’s summons that is equally applicable to traders and non-traders, and may be noted as a great improvement upon the practice under the old law, where, by means of the more cumbrous machinery of two different forms, viz., a judgment debtor summons and a trader debtor summons, much the same result was obtained. Disobedience to this debtor’s summons is an act of bankruptcy.

The trustee is the most important part of the machinery now used for collecting, managing, and distributing a bankrupt’s property. He is in many respects similar to the old trade assignee: his greater power being checked by the committee of inspection appointed by the creditors, and the

comptroller, a new official of the Court. In imitation of that most admirable process, carried on under the direction of the Court of Chancery for the management of estates and the settlement of creditors' claims, he has much likeness to an official liquidator and receiver. Immediately upon his appointment all the bankrupt's property vests in him, he has full powers over it, subject indeed to the directions of the creditors, but practically very much will be left to his discretion. He is to declare a dividend and pay it: in short, he is the pivot upon which the whole scheme of bankruptcy administration will most certainly turn. The provisions by which all this is carried out show the spirit that lives throughout the new Act, the intent of the Legislature being to put the bankrupt and his property into the hands of his creditors, and, providing only the machinery for doing so, to leave them to realise the assets for themselves. In furtherance of this design, we find that, by section 14, after an order of adjudication has been made, the creditors shall by resolution "appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, at such remuneration as they may from time to time determine, if any." This resolution, as appears by section 16, will be decided by "a majority in value of the creditors present personally or by proxy at the meeting, and voting on such resolution."

The *status* of the trustee comes next, and this will be a matter of some importance in every-day practice, for his powers are so large and varied, and the system of checking him by means of a committee of inspection and a general meeting of creditors is so complicated, that we fear many questions of difficulty will arise. Sections 25 to 30 relate to the trustee's powers and duties, the nature and extent of which will be better understood by dividing the whole into three parts. (1.) What he can do of his own mere motion and in his discretion. (2.) What must be sanctioned by the committee of inspection. (3.) What must be approved

of by a majority of the creditors present at a general meeting or at the instance of a special resolution, which must be carried by a majority in number and three-fourths in value of such creditors. In regarding these three divisions, one cannot fail to be struck with an idea that the new Bankruptcy Act is only suited to those larger failures, where, from the magnitude of the interests involved, creditors are likely to take that trouble which appears necessary. The committee of inspection to be appointed by the creditors is to consist of not more than five of such creditors qualified to vote, and they are also to fix the *quorum* of such committee. Now, though all these and other similar regulations are doubtless well suited to the management of a large estate, where there is a body of influential creditors, yet they seem hardly compatible with those small bankruptcies of which we have lately had so many. It is probable that the framers of the Act were fully aware of this, and sought to give no encouragement to those petty failures, where no dividend at all is often paid, and which were so frequently brought on by fear of execution and arrest. We cannot here attempt to define the powers and duties of the trustee, but must refer our readers to the Act itself; merely observing that he will have to give some kind of security, and may receive some remuneration. This latter fact has induced a pretty general belief that a sort of new profession will in time spring up, comprised of men always ready to be trustees in bankruptcy. Such an event may perhaps happen, but it is at least clear that most of the large estates will fall into the hands of a few solicitors and the large accountants.

The trustee's title to the bankrupt's property, as already observed, is simply by virtue of his appointment, but, though founded upon that, it dates by relation back, from the commencement of the bankruptcy. By section 11 it is provided that the completion of the act of bankruptcy, upon which the order of adjudication was made, shall be

deemed to be the commencement of the bankruptcy. Now, as such an act must have been committed within six months prior to the presentation of the petition, the trustee's title cannot in general relate back to any date earlier than that period. But then the section goes on to provide that if the debtor is proved to have committed more acts than one, the bankruptcy shall be deemed to have commenced at the date on which the first of such acts was committed, within twelve months next preceding the order of adjudication. This will, however, only be the case when at the latter date the debtor was indebted to one or more creditors in the sum of 50*l.*, or upwards, which still remains unpaid at the adjudication: so that the trustee's title can never relate back more than one year, and then only where it is proved that during the whole time the debtor was insolvent, or appeared such, and so could have been made a bankrupt. The concluding portion of this section is new; the first part is similar to a provision in the Act of 1861.

We have now seen when the trustee's title accrues; the next question is what property is vested in him? Section 15, which refers to property divisible among creditors, relates to this, enumerating firstly what property is not so divisible, and secondly, what is. It is unnecessary here to dwell upon these provisions which are similar to the old law, or are of little practical importance; we will therefore take only clause 5, which contains the doctrine of reputed ownership, and is as follows; being one of the particulars that are comprised in the property divisible amongst creditors.

“(5.) All goods and chattels being at the *commencement of the bankruptcy* in the possession, order, or disposition of the bankrupt, *being a trader*, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner, provided that *things in action*, other than debts due to him is

the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause."

We have already noticed the commencement of the bankruptcy, and found that part of the same provisions were contained in the Act of 1861; this clause also is similar to another in the Act of 1849, but with two important alterations. Firstly, reputed ownership is now confined to traders. This is a return to the old law as it stood before bankruptcy was applied to all classes, and seems more in accordance with justice, for it is evident that more harm can be done, and fraud encouraged, by permitting trader debtors to show the public goods not their own without suffering any penalty, than in the case of non-traders, who do not rely so much upon appearances in obtaining credit: though, certainly, the distinction is rather fine. An attempt was made in the House of Commons to abolish the doctrine altogether, and it has been said that in such cases the creditors get other peoples' property, to which they have no just claim. But it must be remembered that those who let debtors have their goods so that they may, by a show of property, obtain credit, should take the consequence of their act, and that without some such provision more room would be given for the already common enough practice of swindling creditors. The second amendment made by the new Act in the doctrine of reputed ownership is that things in action, other than debts due to the bankrupt in the course of his trade, shall not be deemed within the clause. This was necessary, for, under the old law, things in action, such as promissory notes, cheques, bills of exchange, &c., were considered to be included in the term, "goods and chattels;" and so, though not belonging to the bankrupt, they passed to his assignees if found in his possession. Such a construction as this was evidently a most unjust and improper extension of the original principle, for things in action are an invisible kind of property,

upon which the bankrupt could not well have obtained credit.

While upon the subject of property it may be well to mention the changes made by the new Act in the law as to voluntary settlements made by a bankrupt. It will be remembered that under the Act of 1861, by section 126 of that Statute, it was provided that when a bankrupt, *being at the time insolvent*, transferred any of his property to his children or any other person, not being for value or in consideration of marriage, the Court had power to sell the same for the benefit of creditors. It was, therefore, necessary that any claimant should prove the insolvency of the settlor at the time of making the settlement before he could maintain its invalidity. The great and various difficulties that could not but arise in getting evidence to support such a case rendered the section of little avail, and the law was therefore seldom used. But by section 91 of the new Act this has all been changed, the relative positions are reversed, and the onus of proving his solvency is, in fact, thrown upon the bankrupt himself. This being one of the most important amendments introduced into the last Statute, it is worthy of a somewhat careful examination. The words of the section are as follow:—

“(91.) Any settlement of property made by a *trader* not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two years* after the date of such settlement, be void as against the trustee of the bankrupt appointed under this Act, and shall, if the settlor becomes bankrupt at any subsequent time within *ten years* after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor



was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader, in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this Act.

“ ‘Settlement’ shall for the purposes of this section include any conveyance or transfer of property.”

It will be seen that this section is framed upon the same principle as that which we remarked on in our last number, when considering the punishment of fraudulent debtors, viz., a distrust for one who does a suspicious act under suspicious circumstances, and a reversal of the ordinary rule of law by presuming him guilty until he proves his own innocence. For, as appears by the above, a post-nuptial settlement or other like transfer of his property by a debtor without valuable consideration, is void as against the trustee if he becomes bankrupt within two years after its date. This section then goes on to provide further that it shall also be void if his bankruptcy happen within ten years of such time, unless the parties claiming under the settlement can prove that the settlor was more than solvent when he made it, or, to use the words of the Act, was able to pay all his debts without the aid of the property so settled. These provisions seem stringent enough to prevent any kind of fraud in this direction, for, in the first case of such suspicious dealings, the settlement is declared absolutely void, while even in the second, and for so long a time as ten years, it is also void unless those claiming under it can show grounds for its validity. It will be seen that the whole section is carefully confined to



traders, though, it would perhaps be difficult to give a reason for this distinction.

Another most important section of the new Act, and one which has done much towards giving it popularity, is the 48th, relating to the discharge of bankrupts. Under the old law the bankrupt had only to apply for his discharge and obtain it, unless his creditors opposed him. It is true the Court might suspend or refuse the order when he had been guilty of a misdemeanour, or had fraudulently contracted debts, or not kept proper books of account, or because of his extravagance, &c.; but there was no legal necessity for his having paid any dividend. Such a system as this naturally led to many cases of hardship and injustice to creditors, who, not being able to oppose on any of the above grounds, could do nothing to prevent their debtors obtaining a discharge from all future liability without even the smallest proportion of payment or composition. Again, creditors for many reasons—such as not wishing to waste time and money—did not go to the Court and oppose; consequently even the most fraudulent debtor escaped without trouble and without paying any dividend. This state of things had for some time furnished ground for complaint against the Act of 1861, and so, in the new Statute, we find it provided, that no bankrupt shall obtain an order of discharge, except under special circumstances, without paying a dividend of ten shillings in the pound, and that his after-acquired property shall in some cases remain liable for the payment of his debts. But to arrive at a clear understanding of this important section, it is necessary to consider two others, those providing for the close of bankruptcy and the *status* of an undischarged bankrupt.

By section 47 it is enacted that, when all the bankrupt's property has been realised, or so much thereof as can be realised without needlessly protracting the bankruptcy, the trustee shall make a report to the Court, and the Court, if satisfied that such is the case, or that a composition or

arrangement has been completed, may make an order closing such bankruptcy. A copy of this order is to be published in the *London Gazette*, and deemed conclusive evidence. This close of bankruptcy is an entirely new arrangement; it having become necessary as the order of discharge is likely to be delayed for some time in almost every case.

Section 54 defines the *status* of an undischarged bankrupt, and contains an entirely new principle and practice. When an order of discharge had been either withheld or refused under the old law, the bankrupt became at once liable to the ordinary process of an action at suit of any of his creditors. But where the order is suspended for the purpose of giving the bankrupt time to make up the required dividend before he can obtain his discharge, to allow such actions would be no longer equitable; so that, by the above section, no portion of a debt provable under his bankruptcy is to be enforced against the bankrupt until three years after the close of such bankruptcy. The bankrupt has thus three years given him in which to pay his creditors ten shillings in the pound, and for these three years he cannot be molested. If, however, at the expiration of that time he has not satisfied this requisition, any balance remaining unpaid, in respect of any debt proved in the bankruptcy, shall be declared to be a subsisting debt in the nature of a judgment debt, and may be enforced against the debtor, with the sanction of the Court which adjudicated him a bankrupt; but this will be subject to the rights of any persons who may have become creditors since the close of the bankruptcy.

We now come to the actual order of discharge, which, as appears from section 48, may be applied for by the bankrupt when the bankruptcy is closed, or at any time during its continuance. But, instead of its being for the creditors to oppose, the onus of proving the requirements of the Statute is thrown upon the debtor. The bankrupt,

then, must show to the satisfaction of the Court, either that "a dividend of not less than ten shillings in the pound has been paid out of his property or might have been paid, except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed, to the effect that his bankruptcy, or the failure to pay ten shillings in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge may be granted to him." Upon showing that he has fulfilled any one of these conditions the bankrupt becomes entitled to his discharge; but the Court has still the power either to suspend or withhold it altogether in two cases. These are, where it appears, upon sufficient evidence, that the bankrupt has made default in giving up his property to his creditors, or where a prosecution has been commenced against him in pursuance of the provisions relating to fraudulent debtors contained in the "Debtors Act, 1869."

Section 49 gives the effect of an order of discharge similar to the old law, with the same exceptions, Crown debts being specifically added, for, though they have never been included, they are not mentioned in the like section of the former Statute. We thus see what a great change, and, as most people think, a great improvement, has been made in the law of bankruptcy by this portion of the new Act, placing, as it does, the discharge of a bankrupt upon a far more equitable footing, and giving fair consideration to the rights of creditors.

"Liquidation by arrangement" is a novel form of proceeding introduced by the new Act; the regulations concerning which will be found in section 125. It seems to be in many respects similar to a bankruptcy, and according to the sketch of it given in the above section, without publicity and interference by the Court. But by the rules that have been framed an advertisement is required, and the whole affair is made such a complicated mass of

judicial proceedings that we cannot attempt its explanation here. The meeting to be called, the proof of debts and voting, the debtor's conduct, and the trustee's appointment and duties, are the same as in a bankruptcy. Altogether, we think it probable that the new plan of liquidation by arrangement will be but little used, as it puts the debtor even more in his creditors' power than under a bankruptcy, and seems to possess but few special advantages for either party.

Composition deeds under the Act of 1861 gave rise to many commercial frauds and much general swindling, so that they have received a bad character. But these evil results arose rather from the blundering way in which the clauses of that Statute affecting these deeds were altered into an uncouth shape by odd Members of Parliament, than from any radical defect in the principles upon which their efficacy was founded. This became evident when the Amendment Act of 1868 was at last passed, and although it made at the best but a patchwork affair, we think many will soon regret that something like the same form of proceeding was not continued. The scattered sections of the two Acts that then regulated composition deeds might easily have been consolidated and improved into a more perfect and practicable whole. We should then have had the advantage of possessing in a compact and lawyer-like form a process of arrangement that was already well known in the profession and among commercial men. But the framers of the new Act thought otherwise, and in the Bill, as it left the House of Commons, we believe there was no section relating to a method of arrangement by means of a composition. At the instance of the Lords, the present section 126 was added, which affects to give, in very few words, a plan of composition with creditors, and has been rendered rather more complete by the rules that have been framed. The section itself reads more like a brief sketch of some proposed measure than an actual portion of the law; and as its provisions are likely to be extensively used, it is

probable that many questions of doubt and difficulty will soon arise needing solution. Readers will notice throughout that the draftsman has given it more a mercantile than a legal sound, but though ordinary and extraordinary resolutions may seem simpler than deeds, we doubt whether their construction and practical working will be found more easily decided.

By section 126, then, it appears that the debtor is to begin by summoning a general meeting of his creditors, without whom nothing can be done, and they may, by an extraordinary resolution, agree that a certain composition shall be accepted by them from the debtor. Now, an "extraordinary resolution" is rather a complicated affair, and consists of two parts. First, the creditors must pass a "special resolution," that is, one assented to by a majority in number and three-fourths in value; secondly, this resolution must be confirmed by another passed by a majority in number and value of the creditors present at a subsequent general meeting, held at an interval of not less than a week, or more than a fortnight, from the date of the former. There is one improvement introduced into the old method which deserves notice, and is contained in the third paragraph of this section, providing that creditors whose debts are below 10*l.* shall be reckoned in the majority in value but not in number; before this they had no voice in the matter. By clause 4 it is enacted, among other things, that the debtor shall produce to the meeting a statement, showing the whole of his assets and debts, and the names and addresses of his respective creditors. This statement will need to be both full and accurate, for the acceptance of a composition by the majority will only bind those creditors therein specified. To give these proceedings any judicial effect, the extraordinary resolution, together with the above statement, have to be registered by the Registrar. It does not appear how such a resolution is to be pleaded by the debtor in case an action be brought against him

at suit of a creditor bound thereby. The certificate of a deed, under the old law, was made available as a protection in bankruptcy. This is no longer necessary, as arrest upon a *ca. sa.* is abolished, but as a discharge in bankruptcy may by section 49 be pleaded in answer to such an action, one might have expected to find some similar provision with respect to these registered resolutions, which are, theoretically at least, to have the same effect. But by section 127, it is simply enacted that such registration, either in the case of a liquidation or a composition, "shall, in the absence of fraud, be conclusive *evidence* that such resolutions respectively were duly passed, and all the requisitions of this Act in respect of such resolutions complied with." It is difficult to see how this can answer as well as if the debtor had been allowed to plead the same to any action against him. It is impossible in this brief sketch to enter more fully into even such an interesting question as the practicability of these new forms of arranging with creditors, and we must therefore pass on to other portions of the Act.

The alterations effected by the new Statute in the constitution and powers of the Bankruptcy Court are of great importance, but for their better comprehension a few words of history will be found useful. Without going back to a period anterior to 1832, when some seventy commissioners roved about the country doing their work in a manner as unjust and barbarous as it was expensive, we find that at this date, and by Lord Brougham's Act, the Bankruptcy Court was first established as a settled tribunal in London. Under the Act of 1849 there was a court in London having a jurisdiction of about 100 miles round, the rest of England being divided amongst seven Country District Courts. By the Act of 1861 the London Court was charged with all cases occurring within twenty miles, where the debts amounted to less than 300*l.*, those previously disposed of by the Insolvent Court then abolished; while beyond twenty



miles all such cases went to their respective County Courts. By section 59 of the new Act this is altered, and it is provided that if the debtor resides or carries on business within what is called the "London Bankruptcy District" and defined by section 60 to include the City and the districts of the ten metropolitan County Courts mentioned in schedule 2, he is to be adjudged bankrupt by the Court in London, if not he must go to the County Court of his district, called the "Local Bankruptcy Court," subject to certain provisions for removing the proceedings to London. The limit as to amount of debts is done away with, and by section 130 the Country District Courts are all abolished.

Under the Acts of 1849 and 1861 the Court consisted of Commissioners both in London and the country, with registrars, official assignees, and messengers, and the County Court judges in other places, the registrars and high bailiffs of which acted as official assignees and messengers. But by section 61 of the new Act the London Court is composed of a chief judge and not more than four registrars. Official assignees are abolished, but as the registrars are to act as trustees until the creditors have chosen their own, they may perhaps be called official trustees. With regard to the powers of the new Court section 72 enacts that it may try issues of law and fact to do complete justice between all parties, being subject to no other court and having power to summon a jury.

Appeals were, under the Act of 1861, allowed from the County Courts acting in bankruptcy, and from the various Commissioners, to the Lords Justices. By section 71 of the new Act an appeal is given from local Bankruptcy Courts to the Chief Judge, and from his decisions to the Lords Justices. This is evidently a better plan than the old one, and will probably give satisfaction.

We have now gone briefly through the Act, touching lightly upon its most important sections, in the endeavour to give the reader some idea of the alterations that have



been effected. The rules that have but just appeared are long and elaborate, giving, in fact, a more finished and practical version of the Act itself, and needing, if possible, a more careful study. The subject is one too large to be exhausted in a single article, and, in many portions, of too technical a nature for discussion here. It must, moreover, be remembered that we have but written briefly upon a new and untried Act, and one which, besides containing many novelties in detail, has even introduced new principles into bankruptcy law.

F. M. WETHERFIELD.

#### ART. VII.—SLANDER.

CONSIDERING the very great importance of the rights of reputation, it is somewhat surprising that there is scarcely any branch of the law which is less generally understood than slander. Though the majority of persons have, at some period in their lives, been the victims of false and injurious reports, yet actions for slander are few and far between. The fact that the decisions are frequently obscure and conflicting, while the procedure for reparation is cumbrous and expensive, may account for the infrequent appearance of this class of cases in our law courts. Our daily experience of unhappiness in families in the higher, loss of trade in the middle, and violence and crime in the lower classes, originating from false and malicious statements, forbids our attributing this reticence from legal process to any other causes. It may, therefore, be interesting to consider somewhat briefly the present state of the law, and the defects therein, that from these considerations we may educe some suggestions for the further protection of the public against—

“The tongue that licks the dust,  
But when it safely dares, is prompt to sting.”

Slander is an injury for which, by law, an action for damages will lie. Criminal proceedings cannot be taken for mere spoken words, unless they are seditious, blasphemous, grossly immoral, or addressed to a magistrate while in the execution of the duties of his office, or with reference to those duties, or uttered as a challenge to fight a duel, or with an intention to provoke another to send a challenge. To be actionable, the accusation must be wilful, to the damage of another in law or fact, and be made without lawful justification or excuse. Express malice may be implied from the slander itself, and need not be proved. The allegation must be *false*; it must impute an indictable offence, a contagious or infectious disease, or be injurious to the profession or business of the plaintiff, or tend to his dishersion. In the first case, not only a punishable offence must be alleged, but it must be such a crime or misdemeanour as incurs corporal punishment. The charging an offence, therefore, merely punishable by a pecuniary penalty, although, in default of payment, imprisonment should be prescribed, would not be actionable, the imprisonment not being the primary and immediate punishment.

But the more frequent ground of action is that of *special damage*, as where, by the wrongful act of the defendant, a servant was prevented from procuring a situation, a tradesman lost his custom, or a woman her marriage. It should, however, be borne in mind, that the damage must be the mere natural and direct consequence of the unlawful act.

To the mind of a layman not versed in the nice distinctions of the law, the definition of what is, or what is not, slander is most perplexing. For example, it is not actionable to say, "J. S. is a murderous villain," as this simply implies an inclination; but to say, "J. S. is a murdering villain," would be actionable because it imports a crime committed. To charge another with a crime of which he cannot be guilty, as having killed a person still living, is not actionable, no matter how much the accused may have suffered in reputation therefrom. It is also a matter of difficulty to ascertain what is an

infamous punishment. No one, we think, will be prepared to say that a greater injury can be inflicted by slander than when an imputation is made on a woman of loss of chastity, yet, as the law stands, no damages can be recovered from the traducer, unless specific damage can be proved, which, in many instances, is simply impossible. Chief Justice Cockburn has said, "I think the law very cruel in preventing a woman who has been thus wantonly slandered from bringing an action for the purpose of vindicating her character." Lord Brougham considered the law not only "unsatisfactory" but "barbarous," while many other judges have regretted the state of the law in this respect, and expressed their dissatisfaction that they were not at liberty to determine differently. Illness may ensue from the excitement produced by the slander; a wife may become ill and incapable of managing her domestic affairs; her husband may be put to expense in curing her, and yet it is held, that mere mental suffering or sickness, supposed to be caused by words not actionable in themselves, would not be special damage to support an action. Let, however, the words be written, and the libeller would be liable to either imprisonment or damages.

We would here invite attention to the punishment of the slanderer. In the time of Alfred, the *publicum mendacium* was punished by the cutting out of the tongue, subject to redemption, *juxta capitis æstimationem*. The Greeks inflicted a penalty on the offender, and the Romans added to the fine the mulcting of the defendant in damages. Until very recently, the Ecclesiastical Court had jurisdiction in cases of defamation, and we find in the *London Chronicle* of 1790, that a lady was publicly excommunicated in that year—

"For defaming the character of another lady acquaintance. She was put in the Spiritual Court some time since, but refused to make any concession, although repeatedly applied to by the friends of the other lady. The consequence of excommunication is she cannot enjoy any legacy, inherit an estate, or receive benefit by law except in criminal cases,"

By the 18 & 19 Vict. c. 41, the jurisdiction of the Ecclesiastical Court in cases of slander has been abolished, and the only remedy now left is by action of damages.

It has been said by a learned writer:—

“It would be highly inexpedient and mischievous to subject the utterer of every expression which might possibly provoke offence and retaliation, and ultimate violence, to a penal prosecution; it would be attended with fearful evils, legal as well as moral, if men’s mouths were to be closed to all communications in which the character or reputation of others might possibly be involved. What, then, is to be done if the evil cannot wholly be excluded, and cannot be tolerated without some restraints?”

We think that the same necessity of proving legal malice as now would exist should slander be made punishable in a Criminal Court, and it would certainly have as strict proof. We respectfully differ from the great authority we have quoted in thinking that men’s mouths would then be closed in any fair or just communications respecting the character of others; and we think that the present law places the poorer classes, to whom not unfrequently their character is their one chance of livelihood, in an unequal position before the law. A working man who has been foully slandered, and who has sustained special damage, must bring his action, and must give security for costs. This with many is an impossibility; and so the slanderer may reiterate his falsehoods, and ruin his victim without the latter having any means of redress. What wonder, then, that the experience of Criminal Courts will show a long array of crimes of violence, arising from unchecked slander. Libel is in law worse than slander, because (it is said) of the more durable publicity, and the deliberation of the slanderer in reducing the statements to writing; and therefore it has been made penal, while slander is comparatively free. We do not urge that the same punishment should be awarded to the slanderer as the libeller,

but we can see no reason why the utterer of a false and malicious falsehood, tending to the damage of another, should not be compellable before magistrates to enter into recognizances for his good behaviour for the future, and that words which if written would be libels, should for the purposes of binding over be considered slanders if spoken.

In the consideration of this subject, we have derived considerable advantage from the perusal of the recent edition of "Starkie's Law of Slander and Libel," edited by Mr. Folkard.

#### ART. VIII.—THE LAW OF LIMITATION.

*The Law of Limitation as to Real Property, including that of the Crown and the Duke of Cornwall, with Appendix of Statutes.* By WILLIAM BROWN, Esq., of Gray's Inn, Barrister-at-Law. London: H. Sweet, 3, Chancery Lane. 1869.

EVERY lawyer knows that one of the most important and frequently-recurring points to demand his attention, relates to the effect of time and circumstances in modifying titles and claims. No one knows so well as he how difficult it is, after a lapse of even a short time, to trace out and prove accurately or clearly the events of the past. Deeds and documents may be lost, altered, or destroyed, witnesses be dead or unable to be found, dates confused, and particulars forgotten. Hence our judges, especially in Equity, have long been inclined to discourage stale demands, and to refuse to sanction them by interfering with the actual position of things. Such active interference can only be justified when the state of things renders it probable that the Court has adequate means of arriving at the whole truth in the matter.

“One of the principal reasons for admitting limitations of suits is the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power.” Every custom, indeed, derives its force from time. Some persons, now-a-days, nevertheless, cannot acquiesce in the settlement of property made however long ago, though they insist on the validity of customs but of yesterday, and would exclaim loudly if they were the victims of a state of things imagined by Lord Macaulay—“Suppose you had no Statute of Limitations, so that any man among us might be liable to be sued on a bill of exchange accepted by his ancestor in 1760.”

It is, moreover, contrary to equity and policy that titles should be disturbed, or claims made, at any length of time; for, even if the proof of them could be indisputable and beyond doubt, it would be impossible either to ascertain or carry out the equities arising from the circumstances. All the contracts, relationships, settlements, and other acts done or created by or under those who thought they were entitled to possession, or free from demands, would have to be hunted up, and brought into Court, and all improvements would have to be considered, whilst rents received and spent in good faith must be refunded, and debts must be paid when the debtor or his representatives might by time or misfortune be in straitened circumstances. In fact, as a practical result, everything would be in uncertainty, titles would be unmarketable, and property unimproved, if stale demands were allowed. “The neglect of these salutary laws of limitation would make every title throughout the kingdom shake, and conjure up a frightful group, a host of dark and fantastic suitors, to blacken its courts, and fill their air with novel and discordant sounds, uncouth to all learned ears, unintelligible to all learned minds, and involve the community and all its real property in a maze of groundless, endless, pitiless litigation.” It is far better, therefore, even if it is not



absolutely necessary, that the community should hold that, after a certain time, by-gones should be by-gones, and should thereby divert the attention of its members from endeavours to redress the past,—thus raking up and perpetuating the memory of mutual wrongs—to manly efforts to make a future, and extinguish all hatreds and bitter feelings in the friendship of a common prosperity.

Mr. Brown's work on the Law of Limitation as to Real Property contains, in its introductory chapters, numerous extracts (besides those above given), showing that "in every civilised community a law of this nature, in a greater or less degree, has been established," and clearly setting forth the necessity and object of such a law. Certainly, if the chapters on the origin and object of prescription in general do not contain all that has ever been written on these subjects, they contain an ample repertory of copious extracts thereon, from the most eminent authorities, and the decisions and dicta of the most learned judges.

But though the law of England has recognised the principles of prescription or limitation, it is only within comparatively recent times that the Legislature has done so: for the first so-called Statutes of Limitation, as our author points out in his chapters on the rise and progress of prescription, fixed the periods of limitation by reference to certain fixed events—as the time of Henry I.—beyond the time of Richard I., &c., and they were not based on the principles of prescription. Indeed, it may be doubtful whether the legislators had any other views in the matter than to quiet their own possessions and bar the claims of those who had been "disinherited" in the wars.

Later Statutes, however, have established in most cases rules of limitation, perpetually acting and quieting titles on the true basis of prescription, so that "while the tendency of time is to destroy evidence of title, a title becomes firmer as it grows older." These Statutes have

been the subject of much discussion, and it becomes, therefore, of the greatest importance, especially to the lawyer, to have a good work making the whole law of limitation—which is even mischievous if it is not certain and well-known, and which meets him at every turn—clear and intelligible; and this we think Mr. Brown has done.

A satisfactory work on this subject must necessarily include a vast amount of learning. A glance at the notes to Mr. Shelford's edition of the Statutes of Limitation will at once shew this—as much by the merely incidental references which they contain to numerous branches of the law as by the more copious and direct information which they give. From Mr. Brown's plan, embracing not only these Statutes, but the whole law of limitation, he has been enabled to collect together in the shape of a treatise, principally on the law of limitation independently of the Statutes, most of the requisite preliminary matter to prepare the reader for the study of those Statutes, and to confine himself in the subsequent part of his work to matter more directly and specially applicable to the sections of the Acts.

We thus have, in Book II., chapters on the nature and effects of possession, as regards things corporeal and incorporeal, and as between the Crown, or the Duke of Cornwall, and the subject, and as between subject and subject. And these are followed by Book III., containing chapters on the nature of prescription at Common Law, as distinguished from custom, the persons who may claim, and the claims which may be made, by prescription and custom respectively, the proof of prescription at Common Law, and the loss of prescriptive rights at Common Law. This part of the work brings together a considerable amount of learning otherwise scattered. Most persons are aware of the proverbial efficacy of possession, but few lawyers even have very clear notions as to what constitutes it in many cases, and of the different sorts of possession, and the

various rights and effects incident to or flowing therefrom, and they will be grateful to the author for his labours on the subject.

In Book IV. the author treats of the territorial operation of the laws of limitation, the persons and things affected, the periods of limitation, and their shortening, suspension, and extension, and the operation of the Statutes on the expiration of such periods, and of acknowledgments of title and right. This portion of the work appears to be very satisfactory, and indeed we have found it on the occasions of diverse references for practical purposes to answer the prime object of such a work, and, moreover, to enable the lawyer to avoid the necessity of referring to other books for the proper subsidiary information.

The author does not travel much out of the beat of decided cases, but the many authorities quoted in his chapter on the interpretation of Statutes of Limitation will supply the best guide in doubtful cases.

The last chapter is upon the Statutes of Limitation as between vendors and purchasers—the usefulness of which speaks for itself. The Statutes are given in an appendix.

From the above references to the contents of the book, it will be seen that it faithfully carries out the promise of its title-page, and may be recommended to the practitioner as a comprehensive (and, we think, trustworthy) treatise on the effect of time, possession, and other circumstances, in supporting, modifying, or extinguishing claims of every sort concerning real property. The author appears to trust to his own language little, and to give, as far as possible, the words of authorities.

We could have wished, however, that in his endeavour to compress the dicta of different authorities into single connected sentences, Mr. Brown had paid sometimes a little more attention to construction. Our remark applies more especially to the earlier part of the book, where it is occasionally impossible to find a nominative for the verb and sometimes very

hard to find a meaning for the sentence. The latter, and most useful, portions of the work do not seem open to these strictures. The index is also disappointing, and does not do justice to the book. So full and complete a treatise should have had a more elaborate guide. Some important portions of the text are not referred to in the index (as far as we could see) at all.

## ART. IX.—TRADES' UNION LEGISLATION.

BY HENRY F. A. DAVIS.

THE subject of trades' unions has for some time past occupied a large share of public attention, and deservedly so. In a country like our own, where the national prosperity depends upon the continued excellence and cheapness of the national manufactures, everything which tends to strengthen or weaken the friendly relations between capital, as represented by the employers, on the one hand, and labour, as represented by the *employés*, on the other, must be of national importance. To lawyers the discussion of the subject is especially interesting, because not only do these associations exercise a vast influence over the commerce of the kingdom, but they also give rise to many legal questions, which are by no means easy of solution, and require legislation which would effect great changes in the law as it at present stands.

In the year 1867 a Royal Commission was issued, to inquire into the operation and effect of Trades' Unions, and last summer the final report of the Commissioners was presented to Parliament. In it they recommended that trades' unions should be registered, provided that the rules of a society intending to be registered did not promote any of the following objects:—

- (1.) To prevent the employment or to limit the number of apprentices in any trade :
- (2.) To prevent the introduction or to limit the use of machinery in any trade or manufacture :
- (3.) To prevent any workman from taking a sub-contract, or working by the piece, or working in common with men not members of the union :
- (4.) To authorize interference, in the way of support from the funds of the union, by the council or governing body of the union, with the workmen of any other union when out on strike, or when otherwise engaged in any dispute with their employer, in any case in which such other union is an unconnected union.

From this report three of the Commissioners dissented, and two of them appended to their dissent an elaborate statement of their reasons for so doing. Mr. Hughes, one of the dissentients, has since, in conjunction with Mr. Mundella, introduced a Bill into Parliament, which has for its object to give to trades' unions certain powers and privileges that they do not now possess. To this Bill we wish to direct the attention of our readers, and, in doing so, it will perhaps be convenient to consider, (1.) The alterations in the present law proposed to be effected by the Bill; and, (2.) Whether sufficient grounds exist for any or either of such proposed alterations.

(1.) The proposed alterations in the law. By the first section of the Bill\* the 6 Geo. IV., c. 129, and the 22 Vict. c. 34, are to be repealed from the passing of the Act. By s. 2.,

\* "It shall be lawful for any number of persons engaged in any work or employment whatsoever, whether workmen or employers, to make any agreement with respect to the wages to be paid or the hours to be worked therein, *and with respect to the persons by*

\* This Bill will be found printed at length in 47 L. T. 30.

*whom or the mode in which any work is to be or is not to be done, and with respect to any terms or conditions whatsoever under which any work or employment shall or shall not be done or carried on."*

By s. 3, no person joining in a combination for any of the above objects shall be subject to a criminal prosecution merely because he has so joined.

With regard to that part of the second section which is printed in ordinary type, it may be remarked that no material change would be introduced thereby. The Combination Acts expressly provide that meetings may be held by either employers or employed, for the purpose of determining the wages to be paid or received by the persons present at such meetings, and the hours of labour necessary to earn the wages. The Bill proposes to render it lawful for the same parties to enter into general agreements on the same subjects, without the necessity of holding meetings; and as the amount of wages to be paid, and the number of hours of labour, are merely matters of contract, there can be no serious objection to the alteration.

That portion of the clause which we have printed in italics requires a more attentive examination. The law of England has always been remarkable for the promptitude with which it has discouraged everything which tended to restrict the operations of trade, or to infringe the freedom of individual action. Accordingly, we find that, even in the earliest times, any contract in restraint of trade was held to be null and void, and, as it should seem, rendered the contractor punishable at common law. Thus, in a case in the Year Books,\* a man brought debt on a bond, whereby the defendant bound himself not to exercise his trade of a dyer in the town where the plaintiff lived, for half a year, and it was held that the bond was void, and against common law; whilst *Hull, J.*,

\* 2 Hen. V. fol. 5, pl. 26, A.D. 1414.



swore that if the plaintiff had been present, he should have gone to prison until he had paid a fine to the king (*Per Dieu, si le pl' fuit icy, il irra al prison, tanq' il ust fait fine au Roy*). And although the doctrine has been somewhat modified in the course of successive ages, the general principle still remains the same, that any contract which operates in total restraint of trade is void at law,\* whilst any combination which has for its object the obstruction of the free course of trade may be punished criminally, unless it falls within either of the cases specially excepted by the Combination Acts.

Now, what is proposed to be done? To render legal combinations for the purpose of determining the persons by whom any work is to be, or is not to be done—the mode in which any work is to be, or is not to be done—and any terms or conditions whatsoever under which any work or employment shall or shall not be done or carried on. What these combinations are, and would be, appears from the Report of the Royal Commissioners. From this we learn that the unions seek to obtain a monopoly of labour, so as to raise the amount of wages paid to the monopolists.† To effect this, they have rules limiting the number of apprentices, and excluding, so far as practicable, workmen not belonging to the union; forbidding the employment of boys and women; prohibiting the members from working overtime, or taking piece-work; and strictly confining each class of workmen to its own division of labour.‡ So, in some cases, they claim the monopoly of the work of certain districts. A society in Manchester claim an extent of four miles in every direction round that town, or, in other words, an area of 120 square miles, as their own particular district, within the limits of which they permit no bricks to be

\* See *Mitchell v. Reynolds*, 1 P. Wms. 181; S.C. 1 Smith, L.C., 6th ed. 356. And see also the more recent case of *Mullan v. May*, 11 M. & W. 653; 13 M. & W. 511; where the question was very fully discussed.

† Report, clause 34.

‡ Clauses 34-39.

made, except by Manchester union men, or any bricks to be used except those made within the district.\* All these regulations are, as the law now stands, clearly illegal, inasmuch as they are in restraint of trade. Sir William Erle, in his "Memorandum on the Law of Trades Unions," appended to the Report of the Commissioners, gives several instances of similar restrictions having been held to be void; amongst these may be mentioned *Davenant v. Hardis*, Moore, 576, where it was decided that a bye-law of the Merchant Taylors' Company, restricting the dressing of cloths to the freemen of the company, was void for monopoly; and the *City of London's Case*, 8 Co. 121b, where a charter from the king, granting that none but those free of the city should trade therein, was held to be void for the same reason.

The decided cases, applying these principles directly to Trades' Unions, are few. In *Hilton v. Eckersley*, 26 L. T. Rep., 314; 6 E. & B. 471, some mill-owners in Wigan had entered into a bond, the condition of which, after reciting that the obligors employed many workpeople and servants, and that there were societies or combinations existing, whereby persons otherwise willing to be employed in the mills were deterred by a reasonable fear of social persecution from hiring themselves to work there, and whereby the legal control and management by the obligors of their property and establishments were injuriously interfered with; that the said combinations were sustained by funds arbitrarily levied and extorted by way of a rate upon the persons employed by the obligors, and receiving wages from them; and that it had become necessary, in the opinion of the obligors to take measures for vindicating their legal rights to the control and management of their own property, which would also best

\* Clause 37.

sustain the rights of the labourer to the free disposal of his industry; and that the obligors had therefore agreed to carry on their works in regard to the amount of wages to be paid, and the times or periods of the engagement of workpeople, and the hours for the suspending of work, and the general discipline and management of their works, in conformity to law, for twelve calendar months, in conformity with the resolution of a majority of the obligors present at a meeting to be held for the purpose of carrying the said agreement into effect: witnessed, that the condition was that if the obligors should for twelve calendar months carry on, or wholly or partially suspend the carrying on of their works in regard to the several matters aforesaid, in conformity with the resolutions in that behalf of a majority of the obligors, &c., the bond was to be void in regard only to the persons so performing the condition, but otherwise to remain in force. The Court of Exchequer Chamber held, affirming the decision of the Court of Queen's Bench, that the bond was illegal as being in restraint of trade (notwithstanding the 6 Geo. IV., c. 129), and as preventing the obligors from severally carrying on their own business, each according to his own discretion.

In *Hornby v. Close* (36 L. J. M. C. 43; S. C. 8 B. & S. 175; 10 Cox, C. C. 393; Law Rep. 2 Q. B. 153; 15 W. R. 326), it was held that a trades' union could not take advantage of the 44th section of the Friendly Societies' Act,\* which provides that any friendly society established "for any purpose which is not illegal" may deposit its rules with the registrar, and obtain certain privileges with respect to its property. In giving judgment, *Cockburn, C. J.*, said:—

"As trades' unions, so far at least, as they have come under my notice, have rules and regulations that operate in restraint of trade, I think that, just as in *Hilton v. Eckersley*, the combination of

\* 18 & 19 Vict. c. 63

masters to employ only such workmen as have complied with certain conditions was held by the Exchequer Chamber (affirming the decision of this court, to be not criminally illegal, but illegal in this sense, that the breach of an agreement relating to such a combination, could not be enforced in a court of law; so here, where we have a society which appears to be constituted for the purpose of carrying out the objects of a trades' union, I think it is illegal within the meaning of the decision in that case . . . . These rules, being in restraint of trade, are illegal, and cannot be enforced."

In the famous case of *Farrer v. Close*, 38 L. J. Q. B. 132; Law Rep. 4 Q. B. 602; 20 L. T. Rep. N. S. 802; 17 W. R. 1129, it appeared that the Amalgamated Society of Carpenters and Joiners was a society established under certain rules and regulations, among which were the following:—

"Rule 18, section 6.—Any officer being discharged from employment for holding office, if he sign the vacant book each day, he shall be paid at the rate of the wages he was receiving when discharged; such remuneration to continue until he receive employment. Section 7—Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council, shall be entitled to the sum of 15s. per week. Section 9—Any member refusing work from private objections, unless he can show sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed. Rule 25, section 2—In the event of an application to the executive council from other trades for assistance, the general secretary shall obtain information respecting the same, and, on the executive council being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds may warrant, or the case may, in their opinion deserve."

Two of the judges of the Court of Queen's Bench held that evidence was admissible as to the real character of the society; that the evidence adduced, taken with the rules,

which were ambiguous, showed that it was a trades' union; and that, therefore, it came within the decision in *Hornby v. Close*, and was not legal: whilst two judges were of opinion that the rules did not disclose any illegal purpose, and that evidence of what had been done occasionally could not be used to show that the society was established for illegal purposes. The court being equally divided, the decision of the justices, which was against the society, was upheld. It has been remarked on this case that the judgment of *Cockburn, C. J.*, with which *Mellor, J.*, concurred, relies on the fact that strikes were in fact supported by the society, and seems to assume, though it is not so stated directly, that all strikes are illegal. This view of the law is stated to be based upon the principle of *Hornby v. Close* and *Hilton v. Eckersley*. *Hannen, J.*, thought that the decision of the justices was wrong, because strikes are not necessarily illegal, and, therefore, supporting men on strike is not necessarily illegal. *Hayes, J.*, was also of opinion that the justices were wrong, but he based his judgment chiefly on the vagueness of the evidence. He seemed to think that if the evidence had been clear as to the giving of money to men on strike to prevent their returning to work, he would have agreed with *Cockburn, C. J.*, and *Mellor, J.*\*

Whether or not a strike is, *per se*, unlawful, in the sense of being criminally punishable, is a question of some difficulty which it is unnecessary to discuss at length. Perhaps the decision in *Walsby v. Anley*, 30 L. J. M. C. 121, tends to show that it is, but on the other hand we have the authority of *Bramwell, B.*, in *R. v. Druitt*, 16 L. T. Rep. N. S. 858, for saying "that men have a perfect right to strike," and (*R. v. Bailey, ib.* 859) that "both masters and men have a right to combine—the one to say they will not employ labour in a particular way or on certain

\* 14 Sol. Jour., 94.

terms; the other, that they will not work under a certain rate of wages."

It will be seen from these decisions that the effect of 6 Geo. IV., c. 129, s. 4, is not to render combinations for raising or lowering wages lawful, but simply to relieve those entering into such combinations from *criminal* responsibility; and that therefore associations in the nature of trades' unions may exist, which, though illegal in the sense of not being civilly recognized, are lawful as not being amenable to the criminal law. Such associations can only have for their objects the determining of the rates of wages, and the number of hours of labour, and must not resort to any unlawful means for attaining those objects. We learn from the report of the Commissioners:— \*

"That no trades' union, so far as our observation has extended, has attempted to give to the combination a wholly legal character by confining the application of its funds in support of men on strike to the limits within which alone combinations are legalized by the Act 6 Geo. IV., c. 129. Unions contemplate generally the application of their funds to the support of men engaged in a strike for the purpose of enforcing some decision come to by the union in what they deem to be the interests of trade. Many such strikes would therefore be unlawful combinations at common law, and would not be relieved by the statute."

Such combinations Mr. Hughes' Bill proposes to legalize, as has been already pointed out, and passing by the remainder of the Bill, which relates chiefly to matters of detail requiring consideration when the important principles involved in the clause above quoted shall have been accepted, we now come to the second branch of our subject, viz., the question whether any sufficient grounds exist for the proposed changes in the law?

(2.) Trades' unions, in their primitive form, were merely

\* Clause 58.



benefit societies consisting of artisans engaged in particular trades, who combined together for the mutual assistance of persons employed in a similar manner to themselves. Thus one society would be established having for its members journeymen carpenters only; another would have bricklayers; a third printers; and so on. The object would be to relieve the members in times of distress or illness; to pay expenses incidental to death; to make provisions for widows and orphans of members; in short, to carry on the business of an ordinary friendly society, with the trifling difference that all the members must be employed in the same trade. Societies like these were familiar to the Anglo-Saxons, amongst whom they were known as "guilds," and in some respects were not unlike the large London companies in their present form.

In the natural course of events, these clubs gradually began to take an interest in those questions which principally attract the attention of their successors in the present day. How this came about may easily be seen. As the societies increased in number and importance, it could not well be otherwise than that members should apply for relief, who, upon being questioned as to their reasons for requiring assistance, should make answer that they could not obtain employment, or that they had been discharged, or that they did not receive sufficiently high wages for their labour, and that therefore they had refused to work. The other members of the society being all engaged in the same trade, would listen to such reasons as these, with an attention increased by a sense of community of interest; and would feel that any unreasonable acts on the part of the employers, which drove their fellow-workmen to the funds of the societies, were injurious to the body of operatives generally. What wonder is there, then, that they should meet together, for the purpose of consulting as to the best remedy for the evils occasioned by the unwarrantable demands of the

masters? or that they should endeavour to accomplish, by united action, that which unassisted individual efforts could never effect, viz., the securing to the labourer a fair day's pay in return for a fair day's work? For it must be remembered that the modern trades' unions would, in all probability, never have existed, but for the oppression of the employers, who, by reducing wages arbitrarily to suit their own interests, forced the workers to combine for their mutual protection.

The chief objects of trades' unions, as at present constituted, appear to be the fixation of the value of labour, and the equalising of the condition and wages of the labourer.\* In theory, they have but one weapon, and that is the negative one of refusing to work when what they consider to be the just demands of the labourer are withstood: in other words, of "striking work." In practice, they sometimes resort to other and less harmless means for attaining their ends, such as "rattening, picketing," &c. But these can hardly be called a part of the regular machinery of a trades' union, being more the results of circumstances than of any fixed plan; strikes, however, are the recognized means of trades' unions for attaining their ends. Now, morally speaking, it is difficult to see that there is anything wrong in a body of men simultaneously refusing to work except upon terms laid down by themselves. The terms upon which an individual works depend entirely upon the contract between himself and his employer, and that contract is purely voluntary. If the master does not offer wages, which, in the opinion of the man, are an adequate remuneration for his labour, he need not accept them; whilst, on the other hand, if the man asks too much for his services, the master may refuse to engage him. Both parties being thus at perfect liberty to insist upon their own terms, in the case of in-

\* Report, clause 28.

dividuals, there should seem to be no moral reason to prevent either masters or men from consulting with their fellows as to the terms of employment, and, having fixed upon those terms, from agreeing amongst themselves to obtain them, either by means of a lock-out on the one hand, or a strike on the other. So there can be nothing morally wrong in the workmen framing rules for their guidance in making their demands or in accepting employment; or in their paying periodical sums into a common fund by way of insuring themselves against absolute want in the event of a strike or lock-out actually occurring. Funds being thus obtained, there can be no reason why the contributors should not make regulations for the due application thereof; or in their providing that a member not complying with the rules as to employment, &c., shall lose his interest in the funds of the association. A rule to this last effect is only just, and occasions no greater hardship than does a regulation of a Mutual Insurance Society, which declares that a policy of life assurance shall be forfeited if the assured goes abroad, or otherwise neglects to observe the rules of the society.

Such a combination as that of which we have sketched the outlines, is, in fact, a trades' union of the present time in its simplest form, and one to which no objection can, in our opinion, be raised on *moral* grounds.

But while we think that unionism is not inconsistent with morality, we would not be understood to imply that it ought to be encouraged. On the contrary, we are strongly opposed to trades' unions, because we believe that they must have a prejudicial effect upon the commerce of the country, by increasing the cost of production of our manufactures without any adequate beneficial result to the workmen as a body; and, because they often exercise their power in tyrannizing over the employers in an inexcusable manner. Much, however, as we disapprove of them, it is impossible to deny that

they have now become permanent institutions amongst our labouring classes; and that any attempt to suppress them by the strong arm of the law would occasion something very like a revolution, and that without any chance of real success. And it must not be forgotten that trades' unions are not without their good results. Many of them unite the functions of benefit societies with those of trade associations, affording relief to their members in times of sickness; assisting them, when disabled by accident; making good loss of tools; granting assistance to, and finding employment for members out of work; and in some cases assisting members to emigrate, thereby easing an overstocked labour-market. During the severe winters of 1865-66, 1867-68, the shipwrights, the engineers, the boiler-makers, and the carpenters were enabled to maintain themselves almost wholly without public relief. In the year 1867, the engineers alone expended 58,243*l.*, and the ironfounders 35,272*l.*, in donations to members out of work. The important service thus rendered to the public is beyond all question; whilst it tends to render the men themselves more provident and independent as a class. But, as is well pointed out by the dissentient Commissioners in their "Statement" (p. xliii.), the above are forms of benevolent assurance which nothing but a trades' union could afford. No association could guarantee assistance to members in cases arising from the state of the labour-market, unless it had some effectual means of controlling that market; and of ascertaining that the want of work was absolutely involuntary and inevitable. So with the superannuation fund. It is obvious that this is a benefit of great public utility, sparing the community at large a heavy burden in poor rates and infirmaries' alone. The evidence of actuaries shows us that this could not be attained on mere mercantile principles, except by a payment which would deter nine workmen out of ten from

assuring. The unions can do it at a singularly low rate, because they alone have the requisite means of ascertaining, by actual evidence, whether or not the claimant fulfils the condition of being unable to work, and because a very large number of the union members who are qualified to come on the fund, decline to do so from a feeling of good will towards it.

Recognizing, as we do, the advantages as well as the disadvantages of trades' unions, we cannot help coming to the conclusion that the best form of legislation for them would be that which would most conduce to render them consistent with public policy. We think that they are entitled to protection, and to a freedom from all restriction, but that they do not require or deserve any positive encouragement. In our opinion, their funds should be protected, even though it be taken for granted that they are wholly injurious, because it cannot be right that a man should be allowed to steal or embezzle the funds of his fellows with impunity, merely because he and they have entered into an agreement which is void or illegal in the eye of the law.\* We protect the persons and property of our criminals; *a fortiori* should we protect the property of men who have combined for purposes which are not *mala in se*, and which are only partially *mala prohibita*.

So, we think that the existing law against combinations should be entirely changed. We would give the most perfect liberty, both to masters and men, to combine together to do any act, or to effect any purpose, which

\* See the observations of *Kenyon*, C. J., in the stockjobbing case, *Sanders v. Kentish*, 8 T. R., 165. The temporary Act of last year (32 & 33 Vict. c. 61) may be insufficient to protect the funds of unions, even whilst it remains in force. It is believed that a case will shortly come before the Court of Crown Cases Reserved, in which it will be sought to have a conviction for larceny of the funds of a union quashed, on the ground that "a person cannot be convicted for embezzlement as clerk or servant to a society which is illegal." See *Russell on Crimes*, 4th ed. 442, citing *Reg. v. Hunt*, 8 C. & P. 642.

would not be criminal if attempted to be done or effected by an individual; and we would require every trades' union to be registered. By so doing, these associations would be deprived of all the traits of secret societies, which are under the ban of the law, and this would tend to improve their general character, and would remove a fruitful cause of discontent amongst the classes of which trades' unions are composed. When once they enjoyed a perfect immunity, they would be compelled to court publicity; and, under the influence of public opinion, there is reason to believe that all malpractices on their part would speedily be discontinued.

Further than this we cannot go. And, if so much be conceded to the unions, all attempts on their part to interfere with the liberty of the individual should be suppressed by the action of the law, but the action should be against the persons making the attempts complained of, and not against the unions of which they may happen to be members. If it could be shown in any case, that unionist workmen had committed an outrage upon a non-unionist, or upon a master, which would have been a criminal offence if committed by any ordinary person upon another, then the offenders should be punished, but not otherwise. In a word, we would make no distinction between the acts of individuals and the acts of combinations, but at the same time we would enforce the criminal law against individuals, who rendered themselves amenable to it by trade offences, with as much, or even more, stringency than at present, and that, whether the offenders were unionists or non-unionists.

This we hold to be the only true way of solving the difficult question of how to deal with trades' unions; and we therefore think that the general principles involved in Mr. Hughes's Bill are correct, and deserve the support of all parties. Some of the auxiliary provisions of the Bill appear to require considerable modifications, but these space will not allow us to point out.



In conclusion, the reader should consider the proposal, which has been made in some quarters, to incorporate trades' unions. This would appear to be in many respects desirable, as it would give them a power to contract, and to sue and be sued, and would greatly tend to assist the operation of the boards of conciliation which are so well spoken of in the report of the Royal Commissioners. The only question is, how far the plan is feasible. We confess that we entertain serious doubts on this point.

#### ART. X.—THE WORKS OF GEORGE COODE.

**I**N the Obituary contained in our last number we noticed the death of George Coode, and some of his works. But the topic is one which requires more consideration, both in justice to him, whose merits deserve marked recognition, and in justice also to The State, which might otherwise be deprived of the labours of one of its serviceable sons in matters of great and permanent concern.

At this time we are suffering from the accumulation of matters, the remanets of past times, chiefly through the want of knowledge of the principles and methods on which they should be settled.

Coode was one of those personages who could, or would, do nothing without thought of the deepest character. Everything that he touched passed through the alembic of his mind, was carefully collated with the abundant knowledge which he possessed on most subjects, and finally determined judicially, with calm and severe impartiality.

The mere inspection of the titles of his writings would show that they ranged over the entire field of statesmanship so far as it relates to domestic matters, and, as they rested on principles of practical jurisprudence, did indirectly tend to solve matters of international concern. He regarded

all humanity in every phase, and was not satisfied with aspiration, but must needs realise practically what he conceived to be desirable. His position led him to consider matters in practical detail, in the way of administration and in the way of legislation, in form of every kind, and in corresponding expression down to the minutest details of logical and literary treatment.

Having at one time digested "The Whole Body of Poor Law"—a work of which by some singular blindness the country has been deprived—he touched the whole field of law, and gave it an embodiment which met at once the comprehensive objects of the jurist, and the apprehensive objects of the practitioner. These opposite conditions, so difficult to fulfil, he mastered, and if his work had been adopted he would have solved to the satisfaction of the opposite parties the question of digestion of the law, and would at the same time have given the most exact verification of the minutest details for the consideration of the most doubting and accurate sceptic.

His Appendix to the Report on Local Taxation, in which he embodied the law of twenty-four taxes, a matter of present interest, and it is believed of immediate concern, is another proof of the positions above averred. But it was not only in these excellent performances that he showed his highest ability, that of a shrewd and penetrating, diligent and scrupulous investigator, it was the same whatever he touched; the superficial was with him but an evidence of the underlying causation, which he pursued to its lowest depths, and in like manner he tracked through past periods to the remotest the very germ of the question, and its progress thence to the present time, and with keen sagacity predicted the future.

It is with an eye to such valuable qualities that his works should be read; they should be collected, and studied for the treatment as well as for the matter, for in these days of precipitate legislation it is necessary that both treatment

of research and the resulting product should be equally considered, since it is in both respects we fall into difficulties accumulating at every step of our progress.

In the space we can afford in this publication we must not attempt to give a complete analysis of so many works of so wide a range; we shall therefore content ourselves with giving, in the manner of a catalogue, an account of them, that those who may have occasion to prosecute these subjects may know where to seek their material, and their method.

- (1.) The Irish Poor Law Act.
- (2.) Article on the Poor Laws in the "Encyclopedia Britannica."
- (3.) Report of Local Taxation, and Digest of the Laws relating to Twenty-four Local Taxes.
- (4.) Treatise on Legislative Expression.
- (5.) Report on the Law of Settlement and Removal.
- (6.) Papers on the Consolidation of the Law.
- (7.) Report on the Fire Insurance Duties.
- (8.) Memorandum on the Application of Limited Liability to Joint Stock Banks.
- (9.) Article on the Income Tax in the *Edinburgh Review*.
- (10.) Report on Education.

These are among the number of Coode's Works. Many others there are which were part performances with other persons, in which by no means the lesser part or the least worthy formed his share. These are therefore not cited.

It would, as we have said, be in vain to notice the above works *seriatim* in our publication, so limited in space, we will therefore notice some of the most important, and most relative to the matters, of which we take special cognizance; of such are the Papers on the Consolidation of the Law contributed to the Statute Law Commission; they require to be read in the true sense. They were singularly able—too able—for the perfunctory efforts, if efforts they were, made to accomplish the greatest and most necessary task of the

times, upon which every individual enterprise in legislation depends for its success.

The pending question of Irish tenures is one such instance. The speciality of that question is the adjustment of the rights of owner and occupier. The means of adjustment is a tribunal. The tribunal must have its basis in economy and law—the two great divisions of jurisprudence. But these are as unascertained, and by present means as unascertainable, as are the very matters of right with which the tribunal will have to deal. The personages who will have to preside over the administration of the tribunal, that is, the greater number of them, will be without this basis, groundwork, and framework.

It is so in other cases; we want, first, a knowledge of economy—not political economy simply, but the organisation, natural, conventional, legal, mixed, exceptional, and exceptionable, which make up the state of things; then the law—universal, common, general, special, individual, and particular, by which the rights growing up under that state of things are enforceable and to be enforced; then, the judiciary—imperial, national, local, general, and special; and, lastly, the courts or places where justice is to be administered.

Unfortunately we reverse the processes, and render each impossible by enveloping each earlier one in a skin or garb too scant for its efficient and complete being.

Coode's efforts, so comprehensive, yet precise and clear, so methodical and practical, would have compassed the matter, and obtained for us a combination of needful results which it is hopeless to obtain by any process hitherto adopted.

The Irish Poor Law Act, Chief Justice Blackburn was accustomed to say, was the only Irish Act that he had met with that was self-interpretative. It is a model of practical legislation, but it is but one of the masterly pieces of legislative draftsmanship which, in his official career, he contributed to the public service.

Nor was it mere draftsmanship. His notes to the Act exhibited a full knowledge of official economy, and much shrewd practical suggestion for the conduct of the work. In all his legislative work he accompanied the provisions with well-informed and masterly expositions of the matter, on which the Minister and the Law Officers of the Crown felt that they could rely.

The work on "Legislative Expression" develops a plain but very logical expedient for rendering intelligible and simplifying our legislative enactments, which may be described as a suggestion not to place the cart before the horses, or one horse before and another behind, or on the side; in short, as the manner of our legislation has been, anyhow. It is simply to place the predicament before the consequence, and, in the former to use the expression of case, and in the latter, the expression of enactment. For the exposition of the suggestion and the grounds of it, it would be as well for the reader to refer to the book.

The work on "Local Taxation" shows, in detail, the method of collecting the matter of undigested law, whether in text, book, case, or statute, and placing it in such form as will secure the insertion of every point, as far as is necessary, but not further or otherwise—the exact matter and no more. A few persons trained to the use of these methods might easily accomplish a very large amount of digestion under the direction of some master lawyers. What is difficult to establish at first may be more readily learnt by the examples given.

In the other papers and Reports are curious exemplifications of his keen reasoning. Instead of resting suggestions merely on what has been done already, or the existence of what are commonly called facts, according to ordinary apprehension, he shows what other facts would have been if such so-called facts had not had place, and is at the same time careful to disparage that suggestion of mischief which is usually attributed to what is but care-

ful selection of one-sided appearances, in disregard of the range of circumstances which have contributed to the production of the actual state of things. In so doing he has by his impartiality sometimes succeeded in winning the opposition of all sides, which later experience has proved to be ill-founded, and as short-sighted as ill-founded.

We need sadly a basis of investigation in all our public inquiries, a method which commonly applied would fairly gather up the elements of the question, and so present it that the public at large, unaffected by partisan views, might assist in forming a judgment on which action, administrative or legislative, might be taken with safety. A study of the Reports of Commissioners, so often abortive, would show the value of this view. It is in this sense and to this purpose we should recommend a careful perusal of these works.

Of those which we refer to it may be observed, that they touch on the personality of everybody, and the state and condition of every class of persons; on property of every kind, and the incidents of ownership and occupation; on commerce, foreign and domestic; on functionaries of every sort; on the use and abuse of our tribunals of various kinds, and of the sundry aggregations and congregations of communities, which make up the great whole—The State.

The whole of our social economy comes directly or indirectly under consideration, and the processes by which they may be treated legislatively are discussed both on principle and in detail. 'Tis a pity that so much thought and practical ability should be lost, for so it must be (to some extent at least), since it is a mere impossibility that any other person should pass through the same career of experience—that is, from the state of things which existed before the passing of the Poor Law, and which followed thereon, and which in Coode's case has been pursued by one who was an accomplished logician, jurist, and



practical lawyer, and a skilful official as well as conversant with private concerns of every variety.

Doubtless his case is not singular; others have shared the same fate, and so will many who are now living. We cite it as an instance of our blindness and disorderliness. "A little more sleep, a little more slumber," is ever the cry of the political sluggard, whom we would wake up to a sense of the perils of his lazy '*laissez faire*.'" The worst of it is that our haphazard, gossippy style (not of work, but) of thoughtlessness, plunges us into a sea of mire, helps nothing but a perpetual drift towards undoing, without its compensation, the establishment of a system truly efficient and economical. One statesman after another, yielding to the pressure of the moment, breaks up a system, and before its substitute can be established gives place to a successor, who as madly yields to the cry of failure, which is always urged when reform is in the throes of transition.

The Gathering together in apt order the past, the present, and the coming, is peculiarly the duty of the official whose province it is to carry forward the traditions of The State, and to facilitate fresh effort by an accessible collection of the experiences of each successive period. We are spending a deal of money in re-collecting ancient records (a task worthy of the labour and the cost); we spend none in the apt collection of the current records, which is about the best means of training statesmen for the ever-pressing claims of each succeeding age. Whether one is Conservative, Whig, or Radical, there is the same want, equally fundamental and indispensable, of a more brotherly fellowship of workers in the same direction, which is, perhaps, not to be expected from our Saxonly isolation, and from the keen competition of modern times, but it is not the less regrettable. And we would fain hope that the losses which The State incurs by such instances as the present may incite somebody or other to stem the drift of indifference to the welfare of

those who are to come after us. To save a penny in the Income Tax may be worthy of every patriotic exertion, but to lay the foundations of the welfare of our progeny at an equal cost would probably be worthier.

We understand there is some hope of the Papers of Coode falling into friendly hands, which will not willingly suffer their practical value to be overlooked.

#### ART. XI.—THE FRENCH BAR.

*An Historical Sketch of the French Bar, from its origin to the present day, with Biographical Notices of some of the principal Advocates of the Nineteenth Century. By ARCHIBALD YOUNG (Advocate), Edinburgh. Edmonston & Douglas. 1869.*

AT a time like the present, when changes are taking place in the administration of the law, and when, as incident thereto, some changes, the extent of which it is not easy to measure, may take place in the organization of the legal profession in both its branches, the appearance of Mr. Young's book is most opportune.

In reading this most interesting and unpretending work, one cannot help being struck with the great differences which exist between the two professions in our own country and in France. Taken broadly, the ambition of the English barrister is to become a judge; he may have to be satisfied with something far short of that exalted dignity, but at the outset of his professional voyage the Bench is his goal, and "very sea-mark of his utmost sail." Political life, purely as such, with very rare exceptions he does not venture upon. The reason for this is partly due to the fact we have stated, and partly due to other causes, and among others to this, that political life in this country is the profession of the highest in station or the wealthiest in purse. The portfolio of the minister, on the other hand, is the

ambition of the French advocate. The Bench in France is not recruited from the Bar, nor does it hold in public estimation that almost sacred place that it does with us; and, further, the social position of the judges is not so high as in this country, nor are the emoluments of the French judges upon the same scale. It is therefore to political life that the advocate in France looks, and in that he centres his hopes.

The work before us, within a compass of some 250 pages contains much varied and interesting information. If we may find fault with so admirable a book, we should say that it was somewhat overlaid with dates and detail. But, as the author terms the volume a *Sketch* of the history of the order of advocates, as well as of the biography of many of the illustrious members of the French Bar, perhaps this was unavoidable. The book travels over a great extent of ground, or rather of time, it speaks of events of great interest and importance, and traces diligently and lovingly down the stream of some five hundred years of history, the course of that great profession, the eloquence and ability of whose members have done such splendid service for France.

That the history of an "order as ancient as the magistracy, as noble as virtue, as necessary as justice," should be interesting is but natural. But the history of the French Bar is something more. It is the history of the courage, the devotion, and the patriotism of many of the foremost men of their country, it is the history of the growth of liberal opinion, of enlightenment, and civilization.

The profession of advocate in France dates from a very early period, and although existing as a separate order earlier than the reign of Philip the Fair, the reign of that monarch is a very important epoch in the history of the French Bar. Philip made the Parliament stationary, which formerly had followed the person of the king, and thus he greatly increased the power and influence of the Parisian Bar.

To a somewhat similar circumstance our own Bar owes

perhaps its existence. In this country the 'Bar,' in the sense in which that phrase is commonly understood, cannot be traced further back than the thirteenth century, for it was not until after Magna Charta that the Courts of Law were permanently settled at Westminster, instead of following, as they previously had done, the king's person in his journeys through the country. Speaking generally, the French Bar is a provincial one, scattered over the country, while our own is metropolitan, the system of circuits in this country to a great extent obviating the necessity of barristers settling in different parts of the country.

The growth of business, however, has in England already attracted great numbers of the junior Bar in to the provinces, and as unquestionably the present current of our long needed law reforms sets in the direction of centralization as from many centres, the result will be that our own Bar will become to a great extent provincial also. If this be so, we fear the result will be a degradation of the profession, which one would greatly deplore. The circuit system once destroyed, even the imperfect control the mess at present exercises would be destroyed, and all discipline would be at an end.

No one can read a book such as that of Mr. Young's without seeing how vastly the administration of the law, and how greatly its dignity, depend upon the character and conduct of those who are its ministers.

Already changes are at work (to which attention has been publicly drawn) which argue but ill for the maintenance of the traditionary honour and dignity of the profession in this country. It would be well for the Bar (if for once the body would act as their brethren in France have done repeatedly) to consider, in view of changes which must operate upon them, whether it would not be desirable to organize some new and distinct method of discipline throughout the provinces, in forming local bars, with appointed officers, or some system or machinery whereby professional decorum

and order may be maintained. With this special evil of provincialism to contend against, and under all the changes and vicissitudes through which France has passed, her advocates appear to have maintained unchanged the traditional character, dignity, and political power bequeathed them by their Roman forefathers. This is due, we think, to the more perfect organisation of the profession in France, and to its loyalty to itself. In France the status of the Bar, and the conduct of its members, has been considered matter of imperial concern, and the State has, by positive enactment, laid down rules for its guidance.

Laws have been passed from time to time in France, regulating the conduct of the Bar. One law provides that all arguments calculated to injure the opposite party should be spoken courteously, and another forbids the advocate to make any bargain with the party for whom he pleads for a share of the matter in litigation. This latter rule would seem to resemble our own, save that the rules of conduct which obtain at the English Bar are purely consuetudinary, and the disability which the English barrister lies under from enforcing by action the payment of his fees seems to apply also to the French Bar.\* A subsequent law of Philip the Bold, published in 1274, imposes upon advocates the obligation of swearing that they will only take charge of those causes which they believe to be just, the refusal to take the oath being punished with interdiction. This rule opens up, no doubt, matters which have been subjects of keen controversy, with which we here cannot deal, but we will only say that in our opinion such a rule has only to be made to be practically abrogated. "If an advocate refuses to defend," says Lord Erskine, in his defence of Thomas Paine against the charge of publishing a seditious libel (this was in 1792), "from what *he may think of the charge*, or of the defence, he assumes the character of judge, nay, he assumes it before the hour of judgment."

\* Mollot, "*Règle de la Profession*," p. 141.

The conduct of advocates in this country has been subjected to very little legislative interference. But a statute lately in force, and for all we know it may be so yet, passed in the reign of Edward I., A.D. 1275, enacts, "That if any serjeant, counsellor, or others, do any manner of deceit or collusion in the King's Court . . . he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man." And further, in that old book, the "*Miroir des Justices*," c. ii., s. 9, it is, among other things, ordained "That every pleader is to be charged by oath that he will not maintain nor defend what is wrong or false to his knowledge, but will fight for his client to the utmost of his ability." This injunction, our Bar we think, fairly carries out. The second and third articles of the French law which we have mentioned treat of the fee of advocates, which were to be proportioned to the importance of the cause and the skill of the pleader. The fee was never to exceed a sum equal to about 27*l.* of our money.

In the year 1291, Philip the Fair confirmed the enactments of Philip the Bold concerning the fees of advocates and the prohibition to receive anything beyond the amount fixed by law. From time to time further regulations were made with respect to the duties of advocates, and it is almost amusing to read the repeated recommendations and injunctions addressed to the advocates to be brief in their pleadings, prolixity having been evidently a fault with the Bar of France at all times in their history. The limitation as to the amount of fees seems soon to have fallen into disuse, as we find that in 1453 the advocates were recommended to be moderate in their fees. One usage, which obtains in England at the present time, namely, the signature of counsel under the fee marked upon their briefs, was the subject-matter of an ordinance in the time of Henry III., and forms the occasion of a memorable incident. The king enjoined the Bar to write with their



own hands beneath their signatures the amount of fees they received. The Bar refused to obey the injunction, and in truth resented it as an insult, and to show their determined hostility went in a body to lay down their functions, declaring that they voluntarily abandoned the profession of advocate rather than obey a law injurious to their honour. Four hundred and seven advocates in all thus solemnly protested against the ordinance. When the Parliament met there were no advocates to plead and justice was at a standstill. In the end the Bar succeeded. This is a very strong instance of the internal discipline of the French Bar, and of loyalty to their order, and affords, perhaps, the first example recorded of a strike. Be this as it may, we doubt if the Bar here would ever act as resolutely or so completely in union.

Our author thus describes what may be termed the organisation of the profession.

“From a pretty early period in its history the Bar of Paris was accustomed to arrange itself by benches, in order that its members might meet and confer more easily. These benches were placed in the great hall of the Palais de Justice or in the adjacent galleries. In 1711, the advocates, formerly divided into eleven benches, were arranged in twelve. The first was composed almost entirely of seniors, and a few seniors were placed at the head of each of the others, after whom came the younger members, according to the date of their admission into the order. This organisation, however, was found to be very imperfect, and in 1780 the fifth bench contained 101 advocates, the seventh nine, and the eighth seven; while the tenth had ninety-five, and the twelfth ten. In 1781, a reform took place, and the order was divided into ten columns, each containing from fifty to sixty advocates. Each column elected two deputies, whose functions lasted for two years, and who might be re-elected. These deputies from the different columns, along with the former presidents of the Bar, constituted the council of the order, elected its presidents, watched over its roll, and maintained its discipline. The advocates were further divided into three classes—listeners (*avocats ecoutants*), pleaders (*avocats plaidants*), and

consulting advocates (*avocats consultants*). According to the ancient practice, the young licentiate from the University was presented to the court by one of the seniors of the Bar, and the president administered to him the oath to observe the laws, which he took standing upright, in his gown, with uncovered head, and right hand uplifted ; in short, the ceremony of the oath seems to have been very similar to that at present observed at the Scotch Bar. A minute of the taking of the oath was then drawn up and signed by the senior, or, as he was termed in the olden times, the godfather of the young jurist. After taking the oath, the advocate might assume the gown, but he had not yet the right of pleading. He entered upon a period of probation, called *le stage*, which, by a decree of May, 1751, was extended to four years. Upon the lapse of this period, his name was inscribed in the roll of advocates upon the report of one of the chiefs of his bench or column. The pleaders (*avocats plaidants*) were highly respected, and had the right, not only of appearing in the Courts of Parliament, but also in all the inferior judicatories. The mutual exchange of papers was considered one of the courtesies of the profession, and, before pleading, the advocates were in the habit of making extracts from their briefs, containing the facts of the case, and communicating them to the opposite counsel. Pleading and consultation for the poor was one of the established rules of the ancient Bar, and every week nine advocates met in order to hold gratuitous consultations on the causes of the poor. The advocates, as at present, spoke with their heads covered, except when they pleaded before the King's Counsel. The consulting advocates—*advocati consiliarii*, as they are termed in the old ordinances—held the highest rank at the Bar. They gave their advice to the pleaders, they regulated the affairs of families, and were entrusted with many matters of the highest moment. They had a bench set apart for them in Parliament, and were entitled to a seat on the *fleur de lis*. The head or president of the French Bar was, and still is termed a *bâtonnier*. This title dates back to the middle of the fourteenth century ; but for a long time after that period it was an office of little importance. The name is derived from an ancient usage, according to which the staff (*bâton*) of the banner of St. Nicolas, the patron of the confraternity of advocates, was carried at the head of the order in processions and cere-

monies. He who carried it was termed *bâtonnier*. So late as 1602, however, the dean (*doyen*) held the first place at the French Bar, the *bâtonnier* only the second. The latter is mentioned for the first time as the head of the order in 1687 ; and it is only since July, 1693, that he has had a legal title to be considered the head of the Bar. Formerly, the senior member of the order, by date of inscription on the roll, used to be elected *bâtonnier*. But as the great age of the advocate thus chosen often unfitted him from efficiently discharging the duties of an office requiring watchfulness and tact in no ordinary degree, the order determined to give up this principle of election. The *bâtonnier* is chosen for one year only ; but since 1830 it has been usual, at the close of his first term of office, to re-elect him for a second year. The *bâtonnier* has the privilege of making his business appointments at his own residence, even with those who are his seniors at the Bar. The title of dean (*doyen*) belongs to the senior member of the Bar inscribed on the roll ; but it confers no other privilege than that arising from seniority. The *bâ'onnier*, the former *bâtonniers*, and the deputies from the columns form a council, which meets in the Advocates' Library, and whose chief object is the preservation of the discipline of the order. The *bâtonnier* himself adjudicates upon trifling complaints against members of the Bar ; but if the matter is of consequence, he reports it to the council. If the suspension of a member, or the erasure of his name from the roll, is to be deliberated on, the *bâtonnier*, after examining into the matter, reports to the Crown counsel, and their decision is registered. In the most important and serious cases, the court is petitioned to give judgment in terms of the requisitions of the *bâtonnier*, and the conclusions of the Crown counsel. At the expiration of his term of office, the *bâtonnier* makes up the roll of advocates, with the assistance of the former *bâtonnier* and the deputies, and deposits it in the register before the 9th of May."

We have not space to recount the chequered fortune of the Bar, its destruction at the Revolution, and its restoration under Napoleon, but we must pass on to that portion of Mr. Young's work, which doubtless may be considered the most interesting, namely the biographical notices of some

of the many great men who have graced with their eloquence, or dignified with their learning, the ranks of the profession in France. Among jurists the names of Cujas, Pothier, and Portalis will ever be honoured, and the labours of the French Bar in jurisprudence are eminently worthy of recognition. Pothier was born at Orleans, in 1699. He completed his legal studies in the University of that city, and was appointed Councillor in the Presidial Court of Judicature at the age of twenty-one. In 1736 he commenced his great work on the Pandects, which occupied him during twelve laborious years. In this immense task he had the help of some of his intimate friends, among others of Prevot de la Janés, his colleague in the Court, and Professor of French Law. Upon the death of his colleague Pothier became professor, and his able and enthusiastic teaching speedily gave a remarkable impulse to the school of law at Orleans. For twenty-five years Pothier presided over it, and educated many of the first advocates and magistrates of France. The mantle of Pothier, as a jurist, seems to have descended upon Portalis, who was, perhaps, the ablest lawyer and most upright man who took part in the preparation of the Code Civil. The public life of this distinguished man did not commence until he was more than fifty years of age, and during the whole period of his great labours as a jurist and politician he was almost totally blind, unable either to read or write, his extraordinary memory, however, making up for this defect.

But whatever may be the claims of the French Bar to be considered learned, however much their labours may have added to the science of jurisprudence, it possesses the gift, we were nearly saying the "fatal gift," of eloquence to an extent which removes it far above all competition with our own.

Mr. Forsyth, in his "*Hortensius*," points out that until the magic of Erskine's voice and eloquence was heard in our Courts, the annals of our great trials do not furnish us

with much, perhaps hardly anything at all, worthy of the name of eloquence. If this was the case before the days of Lord Erskine, what have we had since? It is true that Lord Brougham treated our Courts to some powerful and meteoric flights of what was termed in his day eloquence, and thundered forth in both our Houses of Parliament powerful and weighty orations which, in our opinion, did contain, among much, very much, that was extravagant and turgid, here and there passages of great beauty. But his speeches are drugs in the market, and his memory remains with us secured on other, it may be deeper, foundations. Since Lord Brougham we have not possessed half-a-dozen advocates as orators of any real mark. The late Lord Chief Baron, the present Lord Chief Justice, Lord Chelmsford, and perhaps pre-eminently Serjeant Wilkins, found no compeers, and have left no successors as orators, however able as *nisi prius* advocates the present generation of our leaders at the Bar may be.

The national character is ponderous, and he who can nonsuit by an array of cases, or set aside a verdict "upon the authorities," is as much, if not more to the taste of the English attorney (who, after all, is the *deus ex machina*), as the glib, agile Q.C., who makes a jury laugh with him.

The national characteristic to which we have pointed accounts for some of the differences between the two professions. But we cannot help thinking that, beyond this, the French possess a far more worthy appreciation than we do ourselves, of the duties, the responsibilities, and the dignity of the advocate's calling. The tradition of their political power, the result of splendid service, the independence of their profession, their social status, all these furnish bonds of brotherhood, while the old custom of the interchange of papers (one of the oldest of their ordinances), and the ready joint action of the whole order where their privileges or their rights seemed to be in danger, show the confidence they possess in each other's loyalty and honour.

We have hardly space to mention the names even of the more eminent among them, whose reputation as orators still survives, and whose speeches are remembered. Among others, Pierre Séguier (one of whose descendants, the Baron Séguier, so recently resigned his office of Procureur-Imperial in the Court of Toulouse); Omer Talon, in the 16th, Servin and Antoine Lemaistre, in the 17th, and D'Auguesseau towards the close of the 17th century, are well known. Of these D'Auguesseau is the best known. This eminent advocate was born at Limoges, in the year 1668, and was appointed King's Advocate at the Châtelet of Paris at the early age of twenty-one. How true is the saying, "that the history of greatness is the history of youth." Distinction at the French Bar has been, in the great majority of cases, attained at an age which, in this country, would be barely sufficient to entitle a man even to hope for an assize prosecution for burglary, or an undefended cause in Middlesex. At thirty-two years of age D'Auguesseau was made Procureur-General, and Chancellor of France at forty-eight; a success almost as rapid as that of Grotius, who pleaded at the Bar when only seventeen, and was made Attorney-General of the Netherlands at twenty-four.

The discourses of D'Auguesseau are well known. In his magnificent eulogium upon the Bar occur those words, a portion of which we have already quoted, and which we will repeat. Speaking of the Bar, he says:—

"It is an order as ancient as the magistracy, as noble as virtue, as necessary as justice; it is distinguished by a character which is peculiar to itself, and it alone ever maintains the happy and peaceful possession of independence."

Passing the great names of Normand and Cochin, contemporaries of D'Auguesseau, we must for a moment pause at that of Gerbier. This great advocate did not commence to plead in the Courts until he was twenty-eight years of age. But his rare merit soon placed him at the head of the Bar.



In his time we first begin to catch a glimpse of the lucrative character of the profession in France. It is said that he received a fee of 4000*l.* (about 100,000 francs), from the Company of the Indies, and 20,000*l.* from a *Sieur Cadet*, for whose cause he had pleaded successfully.

Mr. Young has here a note upon the fortunes made at the English and French Bars, and compares them with those amassed by the advocates of Rome under the empire, very much to the advantage of the latter: but it is by no means clear that the fee system, as we understand it, obtained at Rome at all, and regard being had to the *then* value of money, the amount of these sums appears to be enormous, very many times beyond any legitimate fee we think ever given in England.

At the time of the Revolution, when the Bar was abolished, after the law of August 16, 1789, under which every one was to have the right of pleading his own cause for himself, one and only one in the Constituent Assembly stood up in their defence, and that one, Robespierre.

"The Bar," said he, "seems still to display liberty exiled from the rest of the world; it is there that we still find the courage of truth, which dares to proclaim the rights of the weak and oppressed against the powerful oppressor. The exclusive power of defending citizens shall be confined by three judges and three lawyers! In that case you will no longer behold in the sanctuary of justice those men capable of rising to enthusiasm in behalf of the cause of the unfortunate, those independent and eloquent men, the support of innocence, and the scourge of crime. They will be repelled, but you will have welcomed lawyers without delicacy, without enthusiasm for their duties, and only urged on in a noble career by sordid considerations of interest; you mistake—you degrade—functions precious to humanity, essential to the progress of public order; you close that school of civic virtues where talent and merit learned, while pleading the cause of citizens before the judge, to defend thereafter that of the people in the legislative assemblies."

Resuming the path of our history from which we turned aside for the moment, we find between the time of Gerbier and the present, materials that might well afford matter for a lengthy paper—the trial of Louis the Sixteenth and that of his queen, the reorganisation of the Bar under Napoleon, the trial of Marshal Ney, and the revolution of 1830; but the Bar of the nineteenth century must claim our remaining space. Hennequin, Berryer, *père et fils*, the brothers Dupin, Dufaure, Garnier-Pagès, Ledru-Rollin, Baroche, Rouher, Jules Favre, Emile Ollivier, with many others, are names with which we are familiar.

Hennequin was engaged in almost all the great trials which took place between the years 1814 and 1834. Among them were the celebrated cases of the disputed succession which followed the death of the Prince of Conde, who was found hanged in his chateau in the August of 1830, and with whom perished the great house of which he was the last representative. Two years after he undertook the defence of the Duchesse de Berri, who had been arrested while vainly endeavouring to rekindle the smouldering embers of civil war in La Vendee. About this time, Antoine Pierre Berryer began to rise to fame. No name is so well known as his. This distinguished man was for many years the undoubted leader of the French Bar, and to him the Bar of our own country has paid reverential honour. The father of Berryer, an able and distinguished advocate, defended Marshal Ney, and the position of the father naturally paved the way for the son. Berryer's life, as that of nearly all the greatest advocates in France, is as much political as forensic. And this characteristic of the French Bar makes its own history almost the history of France.

Among many great political trials in which M. Berryer was engaged, one stands out far above all others in interest—we mean the trial of the present Emperor of the French, for his attempt at Boulogne. In 1852 M. Berryer was

elected Bâtonnier of the Parisian Bar; and, so late as 1858, defended Count Montalembert, who was prosecuted by the Government for certain alleged libellous expressions contained in a newspaper. We most of us remember M. Berryer's visit to Lord Brougham in 1864. Upon that occasion the Bar entertained the two venerable advocates at a banquet in the Middle Temple Hall. His last appearance in the Legislature was in February, 1868; on November 29 following he breathed his last. To the last a Royalist, upon his death-bed, after receiving the last sacrament of the Church, he wrote that touching letter to the Comte de Chambord, which now is matter of history.

Louis Garnier-Pagés and Ledru-Rollin are known to us rather as politicians than barristers, and MM. Thiers and de Tocqueville have achieved a fame, broader and wider than that which the Bar alone can give. Two names of men living among us claim our notice, and with them our imperfect notice of Mr. Young's book must close.

Jules Favre, at present the acknowledged leader of the democratic party in France, and one of the most consummate of living orators, was born at Lyons in 1809. His speech before the Court of Peers in 1835, on behalf of those who were implicated in the fatal disturbances at Lyons, one of great eloquence, marked him out at once. On the retirement of the famous Abbe Lammennais from the management of the journal *Le Mouvement*, M. Favre became one of its chief political directors. In 1860 and 1861 M. Favre was elected Bâtonnier of the Parisian Bar. M. Favre is one of the most consummate speakers of modern times. He has acquired the art in its every branch, and possessing a profound knowledge of his own language, moulds it with a delicacy of finish that is, perhaps, unrivalled.

The present Prime Minister of France, Emille Ollivier, was born at Marseilles in 1826, and was admitted to the Parisian Bar in 1846. In politics a Liberal, his views are

far more moderate than those of M. Jules Favre. As a lawyer he is eminent, and as a speaker, although far inferior to the great democrat, is bold and eloquent.

One quotation we shall give. It is taken from his reply to M. Baroche, in defence of liberty :—

“I affirm,” says M. Ollivier, “that the honourable M. Baroche does not believe in the power of liberty, because he sees only its excesses. These excesses I also, like him, acknowledge and detest. But, for the same reason that we do not forbid the use of fire, because it burns as well as warms; for the same reason that we reject not religion, because there are wicked priests, and justice, because there are false sentences; for the same reason that we condemn not marriage, because there are adulterers; for the same reason that we refuse not to commence a voyage, because we may encounter tempests on the sea instead of propitious winds and starry skies: For the same reason I do not understand why we should proscribe liberty on account of its excesses! In all worldly things the good and the bad are found side by side. We must have the manly courage, when we follow the good, to accept the difficult conditions of strifes and efforts which are the beauty, the glory, the dignity of great undertakings. Royard-Collard has said so, and yet he was no demagogue. Constitutions are not tents set up for sleep; governments are not places of repose, where one’s days may glide away in tranquillity, without care or anxieties; they are posts of honour, because they are posts of battle and of danger!”

Our task is now done. Imperfectly as our work has been executed, we hope, nevertheless, that this mere outline that we have been able to lay before our readers may induce them to read a book, which apart from its own merit, and this is considerable, has an interest we venture to think very far beyond the limits of the profession to which it is more especially addressed.

## ART. XII.—SANITARY LAW.

IF the Royal Sanitary Commission arrive at the conclusion that existing laws are adequate to meet the exigencies of public health, there still remains a question imperatively calling for an answer; and we may hope that the result of the inquiries of the Commission may show us why it is the present system of sanitary law so signally fails in its practical working and application. Amid all the contentions as to the proper disposal of sewage, the differences between subsoil drainage and sewerage, the water and earth systems, the constant and the intermittent supply of water, public against private holding of water and gas, we have at least found this unsatisfactory standpoint, that the health of the community is below its proper standard, that its mortality exceeds the necessary rate, and that much suffering and destitution is incurred by the body politic which might be avoided. But here agreement seems to be almost at an end, and we are launched into a sea of conflicting opinion; as much on the physical as the legislative aspect of the question. It must be useful in a summary manner to lay before our readers for their careful consideration how the matter stands. The three great requisites of pure air, pure water, and pure food, are the *necessaria* of sanitarians. How far these are protected by sanitary law it is almost irrelevant to inquire; how far they are provided by local authority is of national importance. The local authorities are as diverse as the laws under which they are established. We have a Local Board of Health under the Public Health Act, 1848, Local Board under the Local Government Act, 1858, Sewer authorities and Nuisance authorities under the Sewage Utilisation Act, 1865, and Sanitary Act, 1866, and Boards of Guardians and Highway Boards under the

Nuisances' Act, besides bodies established as Improvement Commissioners under local Acts, and though last, not least, we have the Secretary of State for the Home Department, who, under the Sanitary Act, 1866, may become an efficient board in himself (although even yet without the necessary power to collect the moneys he may expend), and execute works of water supply or drainage of any magnitude, as he himself is the judge of the necessity. These various bodies have a quasi-supervision, either by the Local Government Act Office, or the Medical Department of the Privy Council; and it not unfrequently happens that, in the very same locality, one of these bodies before-named is in correspondence with one Government body, while another local authority, aiming at the same object, is in correspondence with the other for the same purpose.

It appears to the writer a matter of perfect impossibility to say where the authority of any of these bodies ends, and the authority of the other commences, for it is not at all unusual for two or even three to co-exist at the same time and in the same locality. There is one step certainly gained by late legislation, that every place in the kingdom which has a known and defined boundary is supposed to have a local authority, but this, while apparently compulsory, is really simply permissive, as no authority exists which has the charge of enforcing the law or providing a remedy for its non-observance. These bodies have to administer twelve Sanitary Acts proper, but how many incidental Acts we are afraid to say, but directly or indirectly they cannot be far short of a hundred. So loose has our system become of incorporating with an Act for a given purpose fragments of other Acts, in which clauses are to be found apparently suitable to the end proposed, that to carry out one we are continually remitted to the provisions of a dozen others. It is, therefore, a matter of no surprise that the ordinary intelligence of a local authority should be a little bewildered in attempting to administer these Acts



and even higher authorities, namely, our judges, have expressed their inability to reconcile their various and often conflicting enactments. To add to these difficulties, the boundaries of these bodies moving over the same ground are not conterminous, so that, while at present there is no available record of sickness, the record of mortality becomes often imperfect as a sanitary guide, and from the mixture of town and country, and sparse and dense populations in different parts of a given area of sickness and mortality, the whole subject of entirely different sanitary aspects and conditions is rendered complex and uncertain. The subdivision of the whole empire into sanitary districts, with one local authority, becomes, therefore, extremely desirable, nor is it less so that the various sanitary enactments should be consolidated into one well-considered measure. This is very different from enlarged powers,—it may curtail some existing, but at the least it would provide a power, in fact and in action, for what is now simply a paper constitution, with imaginary officers, discharging imaginary duties of health preservation. When the Public Health and Local Government Acts were successively called into being by the legislature, and Local Boards of Health, or Local Boards were established under their provisions, the settling of their boundaries was a most arbitrary matter, dependent often upon any circumstance rather than sanitary requirement. Experience has shown that, while rates are to be collected equally over the whole area of a district unequally treated by a local authority, it is not only unjust, but in truth leads to the very defeat of the end, namely, health preservation, by awakening the determined opposition of rate-payers, who resolve not to pay money in return for no benefit. To alter boundaries at present existing is but ill provided for in the various health statutes. This is a part of the present system that requires careful revision, if the larger measures we indicate are not provided

for. This at once brings us to the question of a central authority. We have shown that at present there are two. The writer thinks there should be but one. The present system either does too much or too little. It interferes, it is true, but only when evoked, or after some dire calamity. Permissive legislation in health matters, as in all others where the action of remedies is to entail expense on those providing them, may at once be dismissed as an error. In whatever matters affecting the body politic, and wherever it has been tried, it has been found to be a failure. And in no degree, place, or time, has it more signally failed than in the endeavour to remedy the present sad defects in the dwellings of the poor, by providing what are called private improvements. It is true that it recognizes their necessity, but it furnishes no funds out of which they are to be executed, nor any authority which can compel their provision.

These improvements fall, no doubt, at first heavily on cottage proprietors, especially as the mode of repayment of the principal sum expended, spread over a series of years, is practically impossible. These very proprietors have immense influence, not only in the election of members to local boards, but as members themselves, and do all they can to prevent self-imposed burdens. To be effective, therefore, these urgent needs must be remedied by compulsory enactments. But here it is certain that at present no such power exists. It is true that by s. 45 of the Sanitary Act, 1866, the Secretary of State may be called into action where there is defective drainage and water supply by any one, be he ratepayer, owner, lodger, visitor, or any other person. But it cannot be too constantly borne in mind that these imperial remedies are but the skeletons; to be life-like, to be clothed with the vigour of action, they want daily, kindly, and careful attention in their subordinate application. Whether we are to have an era

when, with the spread of education, all people are to be thoughtful, self-preservative, and ready to avail themselves of all the appliances put in their way, we know not; but this is self-evident that, unless very carefully watched, the best appliances at the present time soon become either useless, destroyed, or unused. There is more wanted than a water tap to ensure cleanliness, or a window that *can* open to secure ventilation. We want an action more ready than that which tells of poisoned water when there is a decade of victims, or points out the causes of gastric or typhus fever, when the misery of the bereaved and the pressure on the poor-rates calls attention to its ravages—central authority, to direct great measures, to sanction them after due inquiry, to be the great fountain head from which information on all points of difficulty in administering the sanitary laws is to be drawn—to assist, to advise, to control—still leaving local action to do the work—to collect information, to sum up results, to be the medium of communication between various bodies, to govern where local differences and jealousies prevent combined action for the general good. These are the outlines of such action as our present exigencies imperatively demand, and which cannot be provided without an entire alteration of the present system. But beyond all this, and in its way infinitely greater, is the continuous skilled action, which an intelligent medical officer of health, appointed by the local authority, but independent of it, to the extent that his action would not be paralyzed, should bring to bear, by daily continuous attention given by himself and assistants, in using these means for promoting the public health. We may have perfect drainage and sewage, good water supply, and yet not banish fever, or cholera; and consumption and bronchitis may still let havoc in upon us. These great works are necessities, but their utilisation is to be directly enforced, urged on a careless, and it may be an unwilling, population

—a population unwilling because either apathetic or incredulous as to the benefits to be procured.

But are we really sure we can obtain perfect sub-soil drainage or perfect sewerage without some organic change in the present sanitary laws?

We have, not before it was needed, found out that to pass our sewage into rivers, and so poisoning the sources of our water supply—for that to these we must look for our future supply, the Water Supply Commission has abundantly proved—was only a repetition of the former process of poisoning our wells by the cess-pit system; a system the return to which in many places the injunctions placed by the Court of Chancery on drainage into rivers has rendered apparently inevitable. The battle of dry-earth closets, sewage farms, water carrying sewage, gravitation, and pumping, and what not of subordinate questions, are still *sub judice*. Previous sewage contamination, present emptying of refuse, animal and vegetable, into streams, and running to waste most valuable matter, retaining it on the ground, or making it a solid residue leaving purified effluent water: What vistas of difficulty there are here, waiting to be lighted up by actual scientific demonstration of the best and the right mode we should adopt in the future! If water be the medium of carrying off our sewage, how can this be managed without in every case the public body being the supplier of water, for its supply must be compulsory to be efficient, and there are no laws to make water supply compulsory when in the hands of a private company. At present to attempt its introduction into every house would lead but to the theft of the fittings. This can, however, easily be remedied by public stations for water, at convenient distances, with a constant supply; and nothing less than this can ensure an efficient remedy in cases of fire, where at the present no payment is made to the water companies, and, as a necessary consequence, no control over this essential element of safety given to fire brigades or the police. When the Public Health

Act and other Acts regulating expenditure were passed, which limited the money to be spent, except in cases where full public works were executed, to one year's assessable value of the district, it was never contemplated that for every 150 inhabitants at least an acre of land must be provided if sewage irrigation is to become general. This alone in the neighbourhood of large towns would go far to swallow up the entire powers of borrowing, and no power of mortgaging being provided in any of the Acts, all moneys would have to be repaid in thirty to fifty years. This is most unjust; it is burdening the present for the good of future generations. Wherever the corpus of the property remains, such as water-works, land for irrigating farms, land purchased for building offices, or any other purpose, which gives to the district property what may, at a future period, be again converted into money, this obnoxious provision of repayment should be removed. Whatever lightens the burden of health rates it is most essential to provide. Whatever unnecessarily increases the burden it is most essential to modify or remove. If sewage farms are to become general; if water is to be provided by the municipality; if gas is to become a matter of public supply; then our present enactments as to borrowing and repaying money must be largely altered. Our present general sanitary powers may be adequate, but they are ill assorted, conflicting, complicated, and press too heavily on the taxpayer of to-day. They require simplification and consolidation; and their most urgent requirements are—complete central authority, local action by one body in a given district in all matters affecting the public health, re-distribution of districts, and altered modes of securing moneys borrowed, and provisions for repayment. No subject for legislation more urgently demands attention, or promises more valuable returns for careful and thorough legislation.



## Notices of New Books.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

The Lives of eminent Serjeants-at-Law, of the English Bar. By Humphrey William Woolrych, Serjeant-at-Law. 2 vols. 8vo. London: Allen and Company. 1869.

MR. SERJEANT WOOLRYCH has, in this work, made a most welcome contribution to our store of legal history. He has supplied two volumes of biography, certainly as interesting and entertaining as any that have appeared for a long time.

The lives of distinguished lawyers have, for the great crowd of general readers, a special charm. Just as without any mere professional or personal inducement, nearly every class of readers fastens on the columns of our newspapers, in which are recorded the Reports of the Law proceedings of the hour, so we find very few persons of any intellect to whom sketches of legal life are not welcome. The lawyer's career, with its chequered course of failure and success, the race for distinction, wealth, and power, the sayings and doings, the witticisms and the jokes, the *on-dits*, the slanders of Westminster Hall, have attractions beyond the ranks of the legal profession. The world outside likes to hear and read of the great struggles going on, or that have taken place in Westminster Hall, and an insight into the lives of those who have played their parts in the thousand dramas of the Temple of Themis cannot fail to attract readers of any intelligence or education. Books, indeed, of small merit in themselves, in which legal annals and legal anecdotes are strung together, have, in their time, been among the most popular productions of the press.

In Mr. Serjeant Woolrych's Lives of the Serjeants we have before us the career of eminent lawyers who, at different periods, have played their parts in Westminster Hall, many of them the principal stars that shone there, some identified with a still wider field, politicians, statesmen, men of literary tastes, and men of the world.

The learned author selects from the list of eminent members of Serjeants' Inn fifty-eight names, and there is not one among them whose biography is not of interest.

Maynard, with whom the list begins, to use our author's own words, "stands conspicuous as a lawyer, a senator, and a politician,"



and certainly he seems to have been a sufficiently crafty politician. He was a practising Serjeant-at-Law in the time of Charles I.; he continued under the Commonwealth, being reappointed Serjeant by the Protector; he was created a King's Serjeant by Charles II.; he had a new patent as King's Serjeant on the accession of James II., and having been one of the five eminent lawyers summoned to their aid by Parliament in December, 1689, and given the eventful legal opinion that the King had abdicated, Parliament declared the throne vacant, and Serjeant Maynard reached the highest point of professional ambition, Keeper of the Great Seal.

In the names that follow we find many already familiar enough to our readers—Barnardiston, Bendloes, Callis, Carthew, Chauncey, Davis, Finch, Fleetwood, Glanville, Hardres, Hawkins, Heywood, Kelyng, Moore, Plowden, Salkeld, Shepherd, Skinner, Tollens, Williams, and Wynne, with whose productions as authors or law reporters every lawyer is acquainted. Adair, Glyn, Trenchard, Whiteloch, Whitaker, who figure in history as politicians. Hill, who was remarkable as a sort of labyrinth of law, without the *gift of the gab*, and Wilkins, who had the latter quality in such abundance without the trammels of legal learning. In the sketch of the lives of these distinguished members of the brotherhood, Serjeant Woolrych has shown considerable judgment and good taste; whilst, unlike Lord Campbell, he has condescended to acknowledge, on all occasions, the sources from which he has derived his varied information.

A rule which the learned author laid down for himself, excludes from this book the names of those serjeants who attained judicial rank. We regret this, and cannot help thinking it is, in some degree, an error. It is perfectly intelligible that those judges who were raised to the rank of the coif, in accordance merely with the old law and custom of the land, should be excluded from a book devoted to the eminent Serjeants-at-Law of the English Bar; but why members of the order who had attained eminence as serjeants, and then become judges, should be excluded, we cannot understand. Serjeants' Inn has at all times contributed its fair share of the judges at Westminster Hall from among its ordinary members, and, notwithstanding the overwhelming influx into the ranks of the modern order of Queen's Counsel, and the discouragement afforded to the time-honoured rank of serjeant by taking away their old privileges, and discontinuing the old order of legitimate promotion at the Bar, there are on the Bench, and have always been, at least as large a number of judges distinguished at the Bar, as serjeants, as of those as *Queen's Counsel*.

This course adopted in Serjeant Woolrych's book excludes from it the names of many very distinguished Serjeants-at-Law. Why Best, Copley, Wilde, Talfourd, or Shee should be omitted from a book devoted to eminent Serjeants-at-Law we are wholly unable to see. Their fame was acquired long before they were raised to the judicial Bench, and though the glory of Serjeant Copley might be lost sight of in the ren own of Lord Lyndhurst, yet Serjeant Best and Serjeant

Wilde were greater men when, as the acknowledged leaders of the Bar, they ruled the Court of Common Pleas, than, when as Lord Wynford and Lord Truro, they came in their turn to be Chief Justices. The genial and graceful Talfourd, orator, poet, dramatist; the high-minded and noble-hearted Shee, the most effective advocate of his day in or out of Westminster Hall, were so wholly identified with the order of eminent Serjeants at the Bar that they never sunk, in their after-acquired titles of Mr. Justice Talfourd and Mr. Justice Shee, those by which they were so much better known. Serjeant Talfourd and Serjeant Shee are names familiar as household words, whilst, outside Westminster Hall, few will remember "Mr. Justice Talfourd" and "Mr. Justice Shee."

We hope the learned author of the excellent work before us will, in a future edition, give the lives of these and others not now among the eminent Serjeants-at-Law.

*The Commentaries of Gaius on the Roman Law, with an English Translation and Annotations.* By Frederick Tomkins, Esq., M.A., D.C.L., and William George Lemon, Esq., L.L.B., of Lincoln's Inn, Barristers-at-Law. Part II. Completing the work. London: Butterworths. 1869.

In a recent number we expressed our high opinion of the first part of this most useful and interesting work. The second part has been executed in the same thorough and satisfactory manner. A full and accurate index has been added.

Mr. Tomkins and Mr. Lemon have supplied a most important *desideratum*. It is essential that every student of Roman Law should know something of "the great institutional writer whose wisdom illuminated, not only the brilliant age of the Antonines, but, although long lost to human observation, exerted a permanent influence upon the jurisprudence of every succeeding age." We quote from a graceful dedication of the work to the present Lord Chancellor. No less valuable will the work be to the classical student, from the light which it throws on the legal allusions of the writers of the Augustan age set forth, when the system of law which prevailed very closely resembled that which is in the Commentaries of Gaius. The present work will be found to be equally interesting to the jurist and the scholar, and the thanks of both will be due to the gentlemen who have devoted much time and labour to the task which they have successfully accomplished. We have every reason to hope that their services in the elucidation of Roman jurisprudence will be fully recognised both in the Universities and in the Inns of Court.

Shelford's Law of Joint Stock Companies, containing a Digest of Case Law; the Companies' Acts, 1862, 1867, and other Acts relating to Joint Stock Companies; the Orders made under these Acts to Regulate Proceedings in the Court of Chancery, and

**County Courts; and Notes of all Cases Interpreting the above Acts and Orders.** Second Edition, much enlarged, and bringing the Statutes and Cases down to the date of publication. By David Pitcairn, M.A., Fellow of Magdalen College, Oxford, and of Lincoln's Inn, Esq., Barrister-at-Law; and Francis Law Latham, B.A., Oxon, of the Inner Temple, Barrister-at-Law, Author of "A Treatise on the Law of Window Lights." London: Butterworths. 1870.

THE present work will be found fully to realise what its title-page would lead its readers to expect. It is an elaborate digest of case law on the subject of Joint Stock Companies, and contains all the other information which is above indicated. Although nominally a second edition of Mr. Shelford's treatise, it is in reality an original work. Since the publication of the first edition, the whole of the law on the subject of Joint Stock Companies has been considerably modified by the decisions of the Courts. The law, especially with respect to questions arising on winding up, has been very extensively developed of recent years, and the Companies' Act, 1867, has amended the Act of 1862 in many important particulars. All this gives an entirely new character to the present work; but in addition to this, the form and arrangement adopted by Mr. Shelford have been changed, and, we think, greatly improved by Mr. Pitcairn.

The work is divided into two parts. The first consists of a digest of cases relating to the principles of Law and Equity as applicable to Joint Stock Companies, arranged as notes to general statements or propositions. These propositions have been prepared with much care, and afford admirable summaries of the law on all the matters to which they relate. With respect to the cases referred to, the aim has been to give a short and correct account of each in such a manner as to show its bearing on the general proposition which it is brought forward to illustrate.

The second part of the work consists of the Statutes and Orders of Court, with notes of all cases interpreting them. On this part of the work the same attention has been bestowed as on the previous, and every case bearing on any of the sections or rules has been carefully noted. A full and accurate index also adds to the value of the work, the merits of which we can have no doubt will be fully recognised by the profession.

**The Administration of India from 1859 to 1868. In Two Volumes.**

By J. T. Prichard, Barrister-at-Law. London: Macmillan and Co. 1869.

To those who are interested in the Government of India, that is to say, to those who are prepared to look beyond the merely insular politics of this kingdom to that which affects the whole empire, it is impossible that these volumes should not be interesting. They are

the record of our attempt to govern India in a new fashion. The first ten years of administration under the Crown might safely have been predicted to contain many errors and many tentative efforts which might well have to be abandoned, but the period is quite sufficiently long to give us some answers to questions which are of interest to all who have ever thought about our government of and our position in India. Has the ten years of new government produced a better feeling between Englishmen and natives? Has the native shown any signs that he is advancing in civilisation, that caste is beginning to go, that his religious superstitions are growing weaker, that he is becoming fitted for self-government, that he regards our countrymen with any other feeling than that of hatred as a conqueror and a tyrant? Is there any chance that we may be able to discipline the country so well, that in the course of years, Hindoos may not only take part in the government, but allow us to retire from it altogether, with the satisfaction that it will not relapse into disorder and barbarism? Is there any likelihood that as the Spaniards have made their language the common one from Panama to Cape Horn, so we may make English to be universally spoken from the Himalayas to Point de Galle? Should we, if we were expelled from or left India within the next ten years, leave any other signs of civilisation than broken bottles? Would our few railways, our canals, our public buildings be worthy of comparison with those left by Mahometan conquerors? Is India finally under English Government to break through the bondage of the past, to uncrystalise herself, or, to choose a more appropriate metaphor, to come to life again after her long hybernation and to begin again to grow? Is it possible that nations whose manners have been stereotyped for many centuries, so that down to the very cut and pattern of a dress shall be a thousand years' tradition, can begin to adapt themselves to the teachings of western civilisation? Or must India, roused temporarily only from her long sleep, again relapse into it, should England ever think it advisable or be compelled to abandon India? Such questions as these are continually being asked by those who take an interest in imperial politics, and one of the most important indirect advantages which England gains from her possession of India and of a colonial empire is that her statesmen are compelled to ask and to answer such questions. A Frenchman thinks that the conduct of every country in Europe is of supreme importance to France, if indeed his theory is not that every country in Europe ought to regulate its conduct in conformity to the wishes of France. But English politics have never had the slightest tendency, except perhaps during the last forty years of the eighteenth century, to become cosmopolitan. And it is therefore of considerable national advantage that our colonies and India should widen somewhat the range of English politics. In India, of course, the problems presented are different in kind from those offered to us by the colonies. The great problem of all is one which has never yet been satisfactorily solved. Given on one side a Christian nation in Europe, containing thirty millions, inhabiting a cold climate, unwilling to intermarry with those of different race,



having a tendency to treat all other races with something of contempt, a contempt which is increased when the inferior race is at once weak and dark-coloured, a nation possessed of great powers of organisation, whose ancestors have been accustomed to self-government from time immemorial, of great energy—a race apparently sufficiently prolific to continue sending relays of Englishmen to replace those who have worn out or died off; and on the other side, a country containing a hundred-and-fifty millions of people, comprising various nations differing as widely from each other as those of Europe, all unchristian but of different and hostile creeds; lastly, on one side a nation, young, active, and growing; on the other, races inactive and which have ceased to grow for centuries; given such conditions, how can one race be of benefit to the other? Can we pour in the new wine of our civilisation into their old bottles? That we are honestly endeavouring to solve this problem Mr. Prichard's book clearly shows us. That our efforts have been very far from successful is known to every one who knows anything of the condition of India; but that we are actually making the dead races show signs of life, are breaking down the caste of two thousand years, that without endeavouring to proselytise the people, we are undermining their old superstitions, are not the less true. If we succeed in quickening India we shall leave behind us greater monuments than all the conquerors who have preceded us put together, even though the buildings and the material works we may leave behind us may be far inferior to theirs.

The volumes before us show how difficult is the task we have undertaken in the government of India. Their author has had the opportunity of seeing India from two entirely different aspects: first as an official under government, and next as a dweller in India in a private capacity, and he tells us that a native, the best informed and best educated, would no more dream of disclosing to an officer of government his real ideas and opinions than he would of introducing him into his zenana. The Asiatic is always on his guard, always wary. His opinions are all suited to chime in with those of the official interrogator. To those who, like himself, have passed from a public to a private capacity,—the change is sudden and marked. It is as if you had worn colored spectacles half your life and they had been suddenly withdrawn. Mr. Prichard does not attempt to tell the story of the rebellion, but begins with the history immediately on its close. In connection with the history he gives us notices of social progress, of questions of finance, of education and of army amalgamation. Some of the information relating to army hygiene is particularly interesting. Mr. Campbell, a few days ago, spoke of the evils which had resulted from our contradictory systems of building barracks in India. The reader desirous of further information on this subject will find it in these volumes. Sir John Lawrence, we learn, believes "that a great deal of the unhealthiness among soldiers arises from their being unmarried." Perhaps no pages are more interesting than those which are devoted to the questions of education in India, and especially of the education

of women. At present the work seems to be languishing for want of female teachers. "Very recently," says Mr. Prichard, "an impetus has been given to it by Miss Carpenter's influence, and the intelligent, enterprising and philanthropic native gentry of Bombay have come forward to aid her with their purses and their co-operation in the most liberal and hearty manner."

Into the interesting question of Braminism—a question which may be regarded as having been brought forward as the result of our science-teaching in Hindoo schools and colleges—we cannot enter, and for a variety of other questions of great importance we must refer our readers to these volumes. Being the latest volumes on the great Indian problems, which we have alluded to at the beginning of this notice, they are on this account the best. But we are much mistaken if they are not widely read by our countrymen as faithful records, written by an able, thoughtful, and observant man, who has had unusually good opportunities of making himself acquainted with his subject of the first ten years' administration of India under the Crown.

Supplements to the Third Edition of Powell's Law of Evidence, containing the Alterations in the Law of Evidence, effected by the Evidence Further Amendment Act, 1869; the Documentary Evidence Act, 1868; the Bankruptcy Act, 1869; and the Habitual Criminals Act, 1869; together with the leading Cases on the Law of Evidence, decided since February, 1868. By John Cutler, B.A., of Lincoln's Inn, Barrister-at-Law, Professor of English Law and Jurisprudence, and Professor of Indian Jurisprudence at King's College, London; and Edmund Fuller Griffin, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworths. 1870.

THE contents of this little work are indicated by its title. The first chapter treats of the "Evidence Further Amendment Act, 1869" (32 & 33 Vict., c. 68). It alludes to an open question, which may arise under the Act of 1869, whether the provisions in the second and third sections, as to the competence of witnesses to give evidence in certain cases where they were not so competent before the passing of the Act render such witnesses also *compellable*, as well as competent. We cannot agree with the opinion of the writers, that such witnesses are compellable as well as competent. In the second section of the Statute 14 & 15 Vict. c. 99, the words are "competent and compellable" which would imply that a witness may be competent, though not compellable, to give evidence. The force of this reasoning the writers themselves admit. We may add, further, that a witness is occasionally exempt from the obligation of giving evidence, where his evidence, if given, would be admissible; as, for instance, he may, if he likes, answer questions tending to criminate himself, though he is not compellable to do so.



The phraseology of the Act of 1869 is, in one respect, somewhat singular. By the second section, "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action." By the third section, "the parties to any proceeding instituted in consequence of adultery, *and the husbands and wives of such parties*, shall be competent to give evidence in such proceeding." Is it to be held, then, that, in cases arising under the second section, the incapacity of husbands and wives of the parties to give evidence is to continue, or are the words removing their incapacity in cases arising under the third section to be rejected as surplusage?

With regard to the fourth section, the writers point out that it would not apply to the case of affidavits, which would continue to be governed by the old law.

The second chapter treats of "Other Statutory Alterations," that is, the remaining statutory alterations mentioned in the title, including the very serious alterations in the law made by the ninth and eleventh sections of the Habitual Criminals Act. The remaining portions of the book consists of notes of last year's decisions bearing upon the subject, followed by an Appendix containing the statutory provisions treated of in chapters I. and II., which are given *in extenso*.

**A Handy Book on Property Law, in a Series of Letters.** By Lord St. Leonards. 8th edition, enlarged. William Blackwood & Sons, Edinburgh and London. 1869.

THIS admirable little work still appears to maintain its deserved reputation. Though professing to be addressed to a man of property, it may be very usefully read and re-read by the lawyer, to remind him, not only of the latest statutes, but of many other things which he may overlook in larger works. The author's life-long familiarity with the subjects treated of enable him also to give many valuable practical hints, not to be met with elsewhere. Not the least merit of the book is that it is both clear, comprehensive, and short.

**A Manual of the Law and Practice of Bankruptcy, as amended and consolidated by the Statutes of 1869, with an Appendix, containing the Statutes, Orders, and Forms.** By John F. Bulley, B.A., of the Inner Temple, Esq., Barrister-at-Law, and John William Willis Bund, M.A., LL.B. London: Butterworths. 1870.

It is certain that the public will be, if they are not already, flooded with the manuals or books of practice, that the Press, fed by the industry of aspiring members of the Bar, will bring forth on the important subject of Bankruptcy. The Bar has long held almost the monopoly of legal authorship, and the *cacoethes scribendi* is very strongly developed among the junior Bar. Emulous of the fame of a J. W. Smith, a Sugden, or a Williams, our authors are members of

that hopeful band, and their names are as yet, we believe, unknown to fame. They have, therefore, we venture to think, done wisely and well in their laudable effort to show what stuff they are made of, for the book shows that care and labour have not been spared.

In the preface to this work the writers inform us that theirs is an "attempt to place before the profession and the public an outline of the New Law of Bankruptcy, and to provide rather a practical manual than a theoretical treatise upon so difficult a subject." We think, after an examination of this work, that the authors have carried out their plan with great credit to themselves, and we hope to the advantage of those who may have to put the book to a practical use. We are not in a position to compare the present work with its rival productions. But, whatever the merits of other works may be, we can, we think, commend Messrs. Bulley and Bund in their effort to make their work complete. The introductory chapter is very well done. It contains a brief account of the history of our Law of Bankruptcy, and a chapter such as this is, in our opinion, the proper method in which to commence such a book, while to the student such an introduction is invaluable.

It would be impossible, within our limits, to place before our readers any worthy *résumé* of this complete manual; but we may briefly state that, passing from the introductory chapter, we find the subjects, "Liability to the Bankrupt Law," with sub-sections, (1.) who may be bankrupt; (2.) who are traders; and the "Acts of Bankruptcy," with sub-sections, (1.) Acts common to traders; (2.) Acts relating to traders only, admirably dealt with, with more than average clearness and conciseness. Excellent as the main portion of the work is, we must also say a word in praise even of such "paste and scissors" work as the Appendix. This is as complete as possible; it contains, we may say with absolute truth, everything that can be wanted by the practitioner, be he barrister or attorney, namely, the statutes, the rules and orders, including the County Court rules under the Debtors' Act of 1869, and the forms, with tables of fees and costs.

The essential merit of the work is completeness, and we think we may assure our authors, that work so well done must meet its reward.

**A Manual of Bankruptcy and Imprisonment for Debt, under the Bankruptcy and Debtors Acts, 1869; an Epitome of the Law under these Statutes, with a Comparative Table, showing the changes made by the new Act. By G. Manley Wetherfield, Solicitor, author of "A Treatise on Composition Deeds," &c. London: Longmans & Co. 1870.**

This is an excellent manual of the new Bankruptcy Law, and will be found very useful both by the legal profession and the mercantile community. It contains a clear and succinct statement of the provisions contained in the Bankruptcy and Debtors Acts of 1869,

and points out accurately the changes in the law which they have effected. To each chapter, into which the matter is divided, the sections of the Acts relating to it are added; those that are of greater importance being given at full length, and those that are of minor importance in a condensed form. Mr. Wetherfield has treated the subject in a thoroughly practical manner, and has given many suggestions which will be likely to prove useful to those who have to take proceedings under the new Acts. The work has obviously been prepared with much care, and may be safely recommended as a trustworthy guide to the new Acts.

Digest of and Index to the Bankruptcy Act, 1869, The Debtors Act, 1869, and the Bankruptcy Repeal and Insolvent Act, 1869. By John Linklater, Solicitor. London: Butterworths. 1870.

It has been well said, that now-a-days a knowledge of the law is not so requisite as a knowledge of the places where you can find the law. We hope we are not libellous when we say that Mr. Linklater's name and bankruptcy are synonymous.

No one knows the subject better; and this thin paper volume will be found a most useful guide to the provisions of the Bankruptcy Statutes of that "*annus mirabilis*," 1869.

The County Court Acts, 1867, with the authorized Rules, Orders, and Forms.—The Admiralty Jurisdiction Acts, 1868-1869, with General Orders and Forms, and full Table of Court Fees and Costs. By G. Manley Wetherfield, Solicitor. 2nd Edition. London: Longmans. 1870.

MR. WETHERFIELD is one of a class, now daily increasing, who recognizes the fact that whatever may have been the past of the County Court system, the future of that system is clear. The legislation of the last few years shows that the public are gaining confidence in the inferior tribunals, and that sooner or later the status of those tribunals will be greatly altered. Already those courts are thronged with suitors; and the profession in both its branches must accommodate itself to the needs of its employers, the public.

The volume before us makes no pretension whatever to the character of a learned or elaborate treatise. It is simply a book of practice, and is, so far as it goes, as complete as possible. Further, it possesses one advantage that shows Mr. Wetherfield is eminently a practical man, and that is, that the size of the book allows of its being carried in the pocket. At the commencement of the work, pp. 1-16 inclusive, there are some excellent "practice notes"; with these we have but one fault to find, and that is, under the head of "costs" we do not see any mention of the recent cases

decided and now reported upon the 5th section of the Act of 1867. With this exception, and it may be that the author has some reason for this omission, we can find no fault with the book, and so well do we think of this little manual, that we shall put it into use practically, and trust to its guidance as soon as an opportunity presents itself. At the present time the literature of the County Court is considerable. The bulk is large, and, upon the whole, the quality high. Messrs. Davis, Short and Jones, Pollock and Nichol, have done good service with their elaborate works. Mr. Wetherfield's book cannot compete nor does it pretend to do so with these. But as a handybook of practice, under the particular Acts, in completeness and in utility we have not heard of any competitor, and we certainly do not know of any rival.

**The Law of Railways: embracing Corporations, Eminent Domain, Contracts, Common Carriers of Goods and Passengers, Constitutional Law, Investments, Telegraph Companies, &c., &c. By Isaac F. Redfield, Chief Justice of Vermont. Fourth Edition, greatly enlarged. In Two Vols. Boston: Little, Brown & Co. 1869.**

THE task which the Chief Justice of Vermont set himself to perform some fourteen years ago, was one of no little difficulty and labour. Adopting a different plan from that pursued by Mr. Shelford in his work on the same subject, Chief Justice Redfield threw his treatise into the form of a digest. The scope of his work rendered this necessary; for he was about to deal with the law both of England and the United States, whilst Mr. Shelford, dealing only with that of England, which is mainly statutory, was able to adopt, without inconvenience, the method of giving the statutes as his text, and the cases on those statutes in the form of notes. As a digest, the work has already fully vindicated the high encomium passed upon it by the present Chief Justice of England, when, after expressing his "admiration for the great learning, research, and power of reasoning" displayed in it, he added his conviction that it "must prove a standard work on the subject of which it treats, and a very valuable addition to the juridical literature common to our two countries." The present edition has been much enlarged, so as to embrace the entire range of the law of common carriers of goods and passengers, and telegraphs. Some matter contained in the third edition, which was not entirely in harmony with the plan of the work, is omitted, but we are glad to find that it is to be published in a separate volume of leading cases and opinions upon the law of railways. What is left, however, forms an exhaustive treatise, which presents, within a reasonable compass and in a properly digested form, the whole law on the subject of railways, both English and American. It is this survey of the law of both countries which gives it a peculiar value, and has made it an often-quoted authority in our courts wherever a



case involving any new principle has been under discussion. The chapter (xxvii) which treats of the duties of common carriers brings together all the decisions in our own and in the American courts, on the nice questions it involves, with the single exception of *Redhead v. The Midland Railway Company*. That case was *sub judice* at the time when this edition was passing through the press; and, as the recent decision in the Exchequer Chambers\* must, we suppose, be taken as final, it is as well it should be noticed here. So far as our courts are concerned, it establishes the distinction between the liability of the carrier of goods and the carrier of passengers, that the former insures the safe delivery of the goods, whilst the latter only comes under the obligation to take due care (including in that term the use of skill and foresight) to carry the passenger safely. The result of this decision is, that the contract of a railway company with its passengers does not imply any warranty that the carriages in which they travel shall be in all respects road-worthy. There can be little doubt that, as Mr. Justice Montague Smith says, in delivering the judgment of the court above, the contention in favour of such a warranty, "so far as it rests on authority, fails in precedent" in the decisions of our own courts. But we venture, with great deference, to demur to his proposition that "it would not have been competent for the judges in the present day to have imported such a liability into such contracts on reasons of supposed convenience." Such an extension of a rule of law by judicial legislation is certainly not desirable if it can be avoided, but our reports are full of cases in which it has been more or less done, and done with advantage. We are much disposed to think that this is a case in which such an extension would be beneficial; that with certain statutory restrictions as to the amount of damage which could be recovered, it would be desirable to extend the rule, so as to make the contract between the company and its passengers an absolute insurance of the safety of their passengers, except so far as accidents are caused by contributory negligence of the passengers themselves. Such a rule will, no doubt, at first sight, to use the words of the American judge (Gould, J.), who laid it down in the American courts, seem a hard rule, but we concur with him in thinking that "it is the best that can be laid down, since it is plain and easy of application, and when once established is distinct notice to all parties of their duties and liabilities."† This view, one of the most able and learned judges we now have on the Bench (Mr. Justice Blackburn) strongly enforced in the dissenting judgment which he gave in the court below. And we feel sure that if its harshness were qualified by some well-considered statutory limitations of the amount of liability, the railway companies would gladly accept it; for it would put an end to the costly litigations involved in the issue of negligence or no negligence, and would reduce every railway accident to a question of the assessment of damages within defined limits.

\* Law Rep., 2 Q.B. 412; 1b. S.C. 4, 379.

† *Alden v. New York Central Railway Company*, 12, Smith, 104.

Essays upon the Form of the Law. By J. E. Holland, M.A.  
London: Butterworths. 1870.

THESE are a series of essays contributed to various periodicals and societies, and including a specimen digest of the law of servitudes. The writer maintains that the question of the *form* of the law is now a more pressing necessity than the improvement of the matter of which it consists. It will not be necessary to assent to this proposition while admitting that the time has come when that form must be amended. Law amendment may well include improvement in the matter as well as in form. We quite agree that formal amendment may be conducted independently of material changes: that, in order to obtain a code, we should first endeavour to obtain a digest; that great care should be taken to map out a really scientific scheme, and that the obtaining a code should be the crowning of the edifice. An ideal code should embrace the whole body of the law. It therefore necessarily supposes the consolidation of our Common Law, including, of course, that portion of our law which is administered by the Courts of Equity, of our Statute Law, and the fusing of the two into one great scientific system. The first point to decide is, what should be the system of classification, or the main outlines of such a code? When this is settled, we may then take care that all our intermediate preliminary work should be in harmony with the final scheme. The subject is inviting, and to do anything like justice, either to it or to Mr. Holland's book, would require more space than we can at present supply. Before returning to it, however, we can confidently recommend these essays to our readers, as containing the results of considerable research of much careful examination into the subject, and of clear thinking.

Mr. Reverdy Johnson: The Alabama Negotiations, and their just Repudiation by the Senate of the United States. By George Bemis. New York: Baker & Godwin. 1869.

THIS pamphlet, which appears to be written from Paris, is a somewhat tedious *resumé* of the Alabama negotiations, from an American point of view. We are bound to say that the tone of the pamphlet is not unfriendly towards this country, though the extreme claims put forth in it on behalf of the United States, and which are implied in its title, would be indignantly repudiated by ninety-nine Englishmen out of a hundred. The object of the pamphlet appears from its opening paragraphs:—

“The extraordinary avowal of Mr. Reverdy Johnson, in vindication of his rejected ‘Alabama’ convention, that the United States *obtained, by the convention in question, all that we have ever asked*, an avowal contained in a despatch to Mr. Secretary Seward, on the 17th of February last, but which has but recently found its way into circulation on this side of the water, is one so calculated to embarrass the country in its further negotiations with England, and to disparage American reputation abroad for fair dealing in



diplomacy, that I feel called upon, as an advocate of American rights and American honour, to expose its groundlessness, and to uphold the perfect fairness and propriety of the Senate's repudiating alike Mr. Johnson's words and his works.

"It is bad enough to have such a compromising assertion as this, of the late Minister to England, caught up and echoed by our English opponents and European ill-wishers generally; but to have it started by our own diplomatic representative, in the first instance, and that out of apparent pique, because the country had not approved of his doings, constitutes an offence against official propriety and national loyalty such as, I believe, has never before been witnessed in an American Minister. I trust that the *exposé* which I am about to attempt, of the injustice of Mr. Johnson's extraordinary avowal, will be so conclusive that the most charitable deduction to be made in his favour, after reading it, will be that either his mind and memory had failed him, or that his ignorance of the subject which he was treating may have left room for his honestly believing in the truth of what he was so rashly and unwarrantedly asserting."

The pamphlet, which consists of 36 pages, is an attack rather upon Mr. Johnson than upon Great Britain. It does not enter much into the intrinsic merits of the question between Great Britain and the United States.

The Law Examination Journal, and Law Student's Magazine, Michaelmas Term, 1869. London: Butterworths. 1869.

THIS periodical, which seems to be practically a continuation of the *Law Examination Reporter* but on a somewhat different plan, appeared for the first time in Michaelmas Term last. The first number contains—(1.) An Essay on the Merits and Defects of County Courts as Local Tribunals, by Mr. M. S. Mosely, the Editor; (2.) A Digest of such New Decisions as appear to effect alterations in the *Principles* of the Law; (3.) An Analysis of the more important Practical Statutes of the Session of 1869; (4.) Intermediate Examination Questions and Answers; (5.) Final Examination Questions and Answers; (6.) Notes on the Examinations; (7.) Correspondence.

The Editor seems to consider the Married Women's Property Bill and Mr. Locke King's Bill as "revolutionary measures," the failure of which to pass into law has left the session almost barren of results, excepting the Bankruptcy and Debtors Acts, 32 & 33 Vict. c. 71, and 32 & 33 Vict. c. 62. The absurd distinction between "specialty" and "simple contract" creditors is (happily as we think) abolished by 32 & 33 Vict. c. 46.

In "Notes on the Examinations," the opinion is expressed that the Common Law and Conveyancing papers of the final examination of Michaelmas Term err on the side of leniency, but that the Equity paper is more difficult than its companion papers. This (the writer of the "Notes" thinks) entitles the examiner to the thanks of all those who have the real education of law students at heart, "inasmuch as he has not followed the too-common method of asking a number of practice questions, based on the Chancery time-table, and

which call alike for the memory and the intelligence of a poll-parrot to answer correctly."

We venture to dissent very strongly from the opinion here expressed, and to pronounce the Equity paper a thoroughly bad paper. The writer of the "Notes" admits that question 53 is "by no means easy of solution." We should think not. Here it is:—"A female infant possessed of reversionary personalty is about to be married, and a settlement of such personalty in contemplation of the proposed marriage is desired; can and will a Court of Equity aid in effecting a valid settlement? And what constitutes the peculiarity of the case?" Answer (as given in p. 39 of the *Law Examination Journal*)—"The Court, it seems, cannot order a settlement to be made out of the reversionary property of a *married woman*; in other words, cannot enforce the wife's Equity to a settlement out of her reversionary personalty. (*Vide Taylor v. Austin*, 1 Drew, 459, *et seq.*; and see also 20 & 21 Vict. c. 57.) There appears to be no reason to doubt the power of the parties themselves, if *sui juris*, to agree to a settlement of an *intended* wife's reversionary personalty, taking care, of course, to constitute trustees with power to do all that is necessary to possess themselves of the reversionary property when it falls into possession. But it appears difficult, at first sight, to perceive in what way the Court could interfere in the instance given by the examiners, inasmuch as an infant would have no power to make such a settlement, except under the somewhat limited provisions of 18 & 19 Vict. c. 43. In a case falling within this statute, however (the intended wife not being under seventeen), the Court might be asked to give its sanction to the settlement, and there seems no sufficient reason to think that such a settlement of reversionary personalty would not be valid."

The first part of this answer is mere beating about the bush. There is nothing in the question about the reversionary property of a woman actually married, or about a wife's equity to a settlement, but the question has reference to a settlement in contemplation of marriage. With regard to the scope of the statute 18 & 19 Vict. c. 43, it will be remembered that its operation is confined to those cases where the intended husband is at least twenty years of age, and the intended wife at least seventeen. The gentleman who has undertaken to answer this question for the *Legal Inquirer* says, with sufficient boldness and common sense, "I do not see the peculiarity of the case." The *Law Examination Journal* does not make this avowal, though it fails to explain what it is that constitutes the peculiarity of the case.

The fact is, the question is utterly nonsensical and unintelligible. And doubtless, if it be the object of an examination paper to "floor" the candidates, there would be a good deal to be said for the papers which are frequently set in legal examinations. But one result of such papers is, that candidates, who are thoroughly well up in their subject, are utterly at a loss to know how to answer the questions given. So far, therefore, from the paper "satisfactorily testing the knowledge of the students," it utterly fails to do so. With regard to

the particular question before us, we have submitted it to barristers of practice and standing in their profession, but they have been utterly unable to conceive what the question can have meant. Nothing can be more absurd than to suppose that a hard paper proves the competence of the examiners. To our mind it proves just the reverse. A fool may suggest a question which an Eldon or a St. Leonards may be unable to answer. Nor does the hardness of the questions necessarily imply severity in the examination. It just as often implies the reverse. The questions may be so hard that nobody can be reasonably expected to answer them. Then examiners are seized with a fit of leniency, and let through many who ought not to be allowed to pass. As for the danger of a young man getting up his subjects like a poll-parrot, the notion is ridiculous. We certainly do not believe in the being who can get up Williams, Hunter, Haynes, White, and Tudor (not to mention a host of other books) by rote, without understanding a word of them; and unless the repetition were absolutely perfect, the candidate would certainly betray himself in his answers. And even if the feat were possible, nothing would be easier for the purpose of testing the understanding of the candidates, than to give questions involving simple applications of the principles of the subject by way of example. There is no need for this purpose to set difficult or unintelligible questions, and there is not the slightest excuse for doing so.

We may remark further on the equity paper, that Question 46 is in these words—"Equity forbids parties standing in certain relations from becoming . . . purchasers of property in respect of which those relations exist. Mention some of these relations.

. . . *And how would you get a case deserving such exception, excepted from the operation of the general rule?*" What can possibly be the meaning of the words we have given in italics?

Marshalling of assets and marshalling of securities are different branches of the same subject, and in fact mean precisely the same thing, the first phrase being used with respect to the estate of a deceased person, the second with respect to the estate of a living man. Yet these two phrases form the subject of two distinct questions—49 and 51 respectively.

We have thought it necessary to say thus much, for the practice of setting hard and long examination papers is a growing evil, and calls for the strongest remonstrance. Let the questions be as simple and intelligible as possible, and taken exclusively from the books appointed for the study of the candidates; and, this done, let the examiners see that they are correctly and intelligently answered.

**The Amalgamations of the Two Branches of the Legal Profession Considered, with a Special Reference to Contemplated Law Reforms.** By C. T. Saunders, Attorney-at-Law. London: Butterworths. 1870.

A ~~very~~ able pamphlet, although somewhat too enthusiastic in tone.

Mr. Saunders has evidently taken a deep interest in this question, and has very ably argued for the amalgamation.

We are by no means hostile to the views of those who advocate amalgamation, and have ourselves, in a very lengthy paper upon the scheme of Mr. Jevons, brought forward what appears to us to be some of the difficulties in the way. We mean the practical difficulties, for we are clearly of opinion that, while this great difference in caste which at present exists between the two branches is altogether wrong, there ever will be some difference between those who work, like the mole in the dark, and those whose names are known to the public as advocates.

We recommend our readers to peruse Mr. Saunders' pamphlet, with which, although we have fault to find, we, in the main, so much agree, that it is but due to the writer to say that he has most ably stated his case.

*On the Liquidation of an Insolvent Life Office.* By C. J. Bunyon, M.A., Barrister-at-Law, author of "The Law of Life Assurances," &c. London: Layton. 1870.

MR. BUNYON'S thorough knowledge of the subject of Life Assurance renders this pamphlet of great interest. He submits "that to wind-up an insolvent life office on the principle of a rateable reduction of claims and by the application of the common fund according to the tenor of the respective policies of insurance, is the only just mode of proceeding, and that which is required by the necessities of the case, by the rights of all parties, and by the broad principles of equity underlying the nature of the institution itself." The manner in which this principle might be worked out to the advantage of all is explained by the author in a very clear and able manner.

*The Law in reference to Suicide and Intemperance in Life Insurance*—read before the New York Medico-Legal Society, by William Shrady, LL.B., Counsellor-at-Law. New York. 1869.

THIS paper contains a review of the leading English and American authorities on the branch of law of which it treats. From this review the following points are established:—

"1. The English decisions strictly construe the words 'die by his own hands or the hands of justice,' or the words 'commit suicide,' as extending to all voluntary acts whether the party committing such acts was sane or insane. 2. The American cases, with few exceptions, construe the same words as meaning only criminal acts of self-destruction, and do not extend to acts not under the control of the will. 3. That it is the business of the insurers to obtain, by general or specific questions, a full statement of the habits and constitution of the insured, and when these have been answered in good faith by the insured, the policy will be held good."



**The Valuation (Metropolis) Act, 1869, with Introduction, Notes, and Index.** By Dolby P. Fry, Esq., Barrister-at-Law, and of the Poor Law Board. London: Knight & Co., 90, Fleet Street. 1869.

THE want of one uniform assessment for rateable property of the kingdom has long been felt, and the difficulty in knowing on what system a union or parish is assessed has always been one of anomaly, injustice, and inequality until the present Act was passed. This Act, however, applies only to the metropolis, and it is much to be regretted that another Act of wider scope embracing purposes of government and local taxation, was not provided for the whole rateable property of the country. An extension of the principles of this Act, if found to work well in the metropolis, must sooner or later be applied throughout the whole country, giving one uniform tax for county rate, police rate, and for other local or imperial taxation that may be needful. This little work not only includes the above-mentioned Act, with its copious notes and references, but three other short Acts, regulating parochial union assessment. In this special department of Poor Law literature the intimate knowledge and practice of the editor of this work stands pre-eminent, and those who are engaged in Poor Law administration will find a great saving of time in studying what would otherwise appear a very perplexing branch of their professional duty.

**The Law to Regulate the Sale of Poisons within Great Britain.** By William Flux, Solicitor to the Pharmaceutical Society. London: J. Churchill & Sons. 1869.

THE sale of poisons is regulated by two Statutes: the Arsenic Act, 14 Vict. c. 13, and the Pharmacy Act, of 1868, 31 & 32 Vict. c. 121, but a third Statute, 26 & 27 Vict. 113, prohibits the sale of poisoned grain or seed.

This little work places before the reader all that is important relating to the two first Statutes, and whatever concerns the regulations and qualifications of Pharmaceutical Chemists. Persons now keeping open shops for retailing, dispensing, and compounding of poisons, must submit to certain formalities expedient for public safety. The registration of chemists and druggists, examinations under the Pharmacy Act, penalties for false representation, form of schedule for sales of arsenic and for other poisons will be found in detail, with much useful information given by a writer practically conversant with the subject.

**Shakespeare Illustrated by the Lex Scripta.** By William Lowes Rushton, Barrister-at-Law. First Part. Longmans & Co. 1870.

THE above is the first part of a collection of illustrations, some of which the author tells us were originally contributed to the Berlin Society for the Study of Modern Languages, of the assumption by Shakespeare of terms then in vogue, mostly in the contemporaneous written law of his period.

The similarity of some of the passages quoted by way of com-

parison with the Statute Law would require very little research or depth of knowledge to discover, even were it by an unprofessional. Take, for instance, the first cited passage from the Duke of Suffolk's charge to Cardinal Wolsey, in Henry VIII.

"To forfeit all your goods, lands, tenements,  
Chattels, and whatsoever, and to be  
Out of the king's protection."

The phraseology here is unmistakeably legal, and history tells us that, under a writ of *præmunire*, originally framed to operate against popish usurpation, these conditions could be imposed. But further on we come to an ambiguity less easy of elucidation. Shakespeare, it would appear to our author, seemed to delight in playing on the word "fustian," and to ridicule the idea of it. This is accounted for by the penalties imposed by the Act of 11 Henry VII., c. 27, for dressing fustians, an article of cloth much in use at that period, among "common people and serving men," after importation. These restrictions were subsequently further enforced by 39 Eliz. c. 13, when Shakespeare was in his prime. Whatever opinion our bard might personally have entertained of the principle of that enactment, he seems to have indulged a good deal in ridicule of it. But exceptions may, we think, be fairly taken to the construction in one or two instances suggested, and put upon words derived from that of "fustian." We have the word itself, and in various forms, the relative positions to it, as "fustilarian, fust, fusty, and mouldy," the latter suggested to be synonymous with "fusty." They are all suggested to have their derivation from "fustian." But was not the word "foistey" corrupted into "fusty" before Shakespeare's time? If so, why is the application of it directed to fustian, when its literal meaning may be applied with equal force, although spoken in the slang of Falstaff. Walker quotes, as Shakespeare's signification of "fustilarian" to be "a fusty fellow," and Mr. Rushton would have that fusty fellow to relate to fustian; but would not the word equally apply to "fuz or fust," as given by Wharton, "a wood or forest," *i.e.*, a woodman or forester? We point this out from among others which may be considered far-fetched.

With slight variation from set legal phrases, Mr. Rushton has laboured hard to work out the meaning of many ambiguous passages, and in most instances we must give him credit for having succeeded to our satisfaction. Taking the little volume before us in its entirety, the least we can say of it is, that it is a very interesting and plausible attempt to throw light upon obscure passages in the works of our immortal bard, a study which Mr. Rushton has peculiarly devoted himself to.

*Die Todesstrafe, in ihrer Kulturgeschichtlichen Entwicklung.*

Eine studie von H. Hetzel. Death Punishment, Studied in Relation to its Historical Development. By H. Hetzel. Berlin : 1870.

**THE** Penal Code, both in past and present times, has its political,



theological, philosophical, and even its medical aspects. The punishment of death in all countries and in all ages, with many curious details of contemporary opinions that held sway, are here minutely described. The first few chapters of the work are occupied with an account of practice and customs for carrying out capital punishment amongst the Egyptians, Persians, Chinese, and Hindoos; in Greece and Rome, and in early Christian ages; during the Mahommedan era and up to the Reformation. The latter two-thirds of the work are, however, more interesting to the student of modern history. Voluminous quotations from every author who has either discussed or written upon the subject, both in Europe and America, comprehend all that has been said by adherents and opponents of the system. The work is a valuable addition to the literature of jurisprudence generally, and to that of criminal law in particular, as it relates to capital punishment.

**Failure of Sight from Railway and other Injuries of the Spine and Head, its Nature and Treatment.** By Thomas Wharton Jones, F.R.S., F.R.C.S., &c. Professor of Ophthalmic Medicine and Surgery, at University College, &c. James Walton, Gower Street. 1869.

**THERE** are certain medico-legal aspects of questions relative to cases of railway injuries which this work was originally undertaken to elucidate; for owing to the numerous and complicated trials instituted for the purpose of recovering compensation from railway companies for injuries by collisions and accidents, a few special works have appeared on the subject, amongst which the present is one of the best.

The failure of sight, which often comes on after the concussion of the spinal cord and brain, appears to depend on a disturbance of the circulation of the blood in the optic nervous apparatus, but how this comes about is not so easily answered. The author has instituted laborious physiological and pathological experiments and observations, calculated to lead to the solution and settlement of different opinions. This work claims from every medical man the most careful study, on account of fundamental principles which it illustrates in the departments of medicine and surgery, but the cases and inferences are such as are well adapted for the guidance of those engaged in legal inquiries, and throughout the work the medico-legal bearings of the subject are constantly kept in view.

There is an additional chapter at the end of the work devoted to the examination of points relating to the process of inflammation, which it perhaps was considered out of place to have entered upon in the work itself; it is distinguished for its remarkable exposition of one of the most common but difficult questions for investigation, and stamps the author as one of the highest physiologists of the present day.

**A System of Shorthand.** By Thomas Gurney. 17th Edition.  
London : Butterworths, Fleet Street. 1870.

ONE would not expect a system of shorthand to be recommended by antiquity ; and the 17th edition of a system first brought into public use in 1738 is a literary curiosity. However, it may compare with modern systems. Gurney's has done the State some service, and continues to do so ; fostered on the one hand by a species of protection, and on the other by traditional prestige. It is scarcely possible for one man to attain such proficiency in two systems as to pronounce upon their comparative merits. It is difficult to apply any conclusive test with two or more persons ; and there are very few who feel confidence in answering a question often asked—Which is the best system of shorthand ? We believe that the present Mr. Gurney, who still retains the privilege of finding shorthand writers for Parliamentary Committees, enforces, as far as possible, the use of the family system, and to any wishing to join his staff this book might be useful. But the system is very little used for press work, and indeed the majority of those who report parliamentary debates and public meetings use a modern system, which has this commendation, that it is developed from first principles and forms as the telescope is elongated by self-contained tubes.

**Reeves' History of the English Law, from the time of the Romans to the end of the reign of Elizabeth.** A new edition, in Three Volumes, with numerous Notes, and an Introductory Dissertation on the Nature and Use of Legal History, the Rise and Progress of our Laws, and the Influence of the Roman Law in the formation of our own. By W. F. Finlason, Esq., Barrister-at-Law. Vol. III. From the reign of Edward IV. to the reign of Elizabeth. London: Reeves & Turner. 1869.

THE present volume brings to a conclusion the labours of Mr. Finlason as editor of Reeves' History of English Law. Of the learning and ability which he has shown in the execution of the task assumed by him, there can be only one opinion. He has thrown light on many dark places of our Jurisprudence, explained much which Reeves and other writers had failed to understand, and traced with admirable skill the development of the great principles of the Common Law of England. Such labours as these of Mr. Finlason cannot fail to have an effect on the study of the history of our legal system. He has dissipated, in the most satisfactory manner, many conventional notions which have long prevailed ; and, if in any case he has failed entirely to substantiate the views he has brought forward, he has never failed to be suggestive and instructive. At present we are compelled to confine ourselves to a mere notice of the last volume. In point of interest, the period embraced ranks before those which preceded it. It records the gradual decadence of

the feudal system, and the substitution of our modern jurisprudence in its essential features. Mr. Finlason, in his elaborate notes, has happily illustrated the nature and character of this great transition. He is equally at home in all the branches of our law, and is able to survey the whole field of our jurisprudence. We can now only thank him for the interesting views which he has presented to us, and express our unhesitating opinion of the value of the labour which he has bestowed on the elucidation of the History of English Law.

## **Events of the Quarter, &c.**

### **CHAIR OF HINDU, MOHAMMEDAN, AND INDIAN LAW.**

THE increase of students-at-law from India, and of Europeans intending to practice at the Bar there, has been so great that the Benchers of the several Inns of Court have thought it necessary and expedient to found in the Legal University a chair of Hindu and Mahommedan law, and the laws in force in British India, with a view of removing the opprobrium that has so long attached to our government of India, not only amongst natives, but Europeans, in consequence of our neglect to teach the laws to those who are destined to engage in their administration, either as practitioners or judicial officers; and the appointment of a Reader in those laws to the Inns of Court having fallen upon the Council of Legal Education, that learned body selected, with the entire approval of the Inns of Court, Mr. Standish Grove Grady, whose works on the Hindu and Mahommedan laws have been reviewed in this magazine. The learned Reader delivered his first lecture in the Middle Temple Hall, on Saturday, the 13th of November last, in the presence of a large and distinguished audience, including representatives of the Benchers, and leading members of the Bar.

After a graceful allusion to the liberality of the Benchers, in founding the new chair of law, and referring to the inducements which actuated them in doing so, he pointed out the advantages that must result therefrom, not only to the Indian community, in consequence of having well-trained lawyers practising in their courts, but to those lawyers themselves, as well Native as European, and also to those destined to discharge judicial functions in India. The importance of the subjects which will form the present course of lectures, the Reader said, was evidenced by the great extent of the territories of India, and by the vast population scattered over them. The former comprising 1,287,483 square miles, the latter from 140 to 170 millions of inhabitants, who, if not the first, were at least one of the earliest civilized nations of the world. Although the Hindus are destitute of any historical account of their ancestors; with regard to their laws, manners, customs, and religion, we are supplied with ample information. The first code of Hindu laws of which we have any knowledge was framed and propounded by Menu.

From it we may form some idea of the state of society and civilization which at an early period (1280 years before Christ) they had attained; from that work as well as from the Vedas, supposed to have been prepared 500 years earlier, we can form some idea of their attainments at that time in science, philosophy, and religion. To go back to the period of the human family, when it might be said that they lived under no rules, or regulations for their conduct, no laws, would take us into a wide field of speculation that would far exceed the limits of a lecture. The prevailing opinion seems to be that all law originated in the family relation, eventuating itself in custom, which subsequently became embodied to a great extent in positive written law. All laws must derive the permanent features of their character from the peculiar manners, customs, and languages of the people amongst whom they originated. The attempt to study the laws of British India has been heretofore met at the threshold by the want of elementary works. The laws themselves are so diverse and complicated in their nature, and are scattered about in such a multitude of volumes, that in the absence of elementary works a long course of laborious investigation and patient study becomes requisite before the student can see his way through a mass of legislation, which must appear at the outset an impenetrable chaos. There has hitherto been no assistance given for the oral and scriptory teaching of the laws of India, and, were it not for the system of progressive advancement which this state of things compelled the East India Company to adopt, and the Government of India to continue, with regard to those destined to discharge judicial functions there, this neglect would have been long since productive of consequences totally subversive of justice, and most disastrous to our best interests in that country. This system of progressive advancement has, it is true, by affording time for the gradual acquirement of the laws, by study on the spot, and for the acquisition of knowledge by actual experience, supplied to some extent (but at great cost and vexation to suitors, in consequence of the series of appeals which it inaugurated) the absence of facilities for preliminary study. But it must not be concluded that such facilities were unnecessary, or that we can with safety postpone the study of the native laws until we arrive in the country and actually enter upon their administration. It is a fatal error to postpone the acquisition of the science of law until the hour of its practice has arrived. This was the error into which the East India Company fell. Instead of holding out inducements to the profession for the publication of elementary works for the study of the law, and appointing professors to teach it to those intended to exercise judicial functions in India, they preferred sending them out in entire ignorance of the laws they had to administer, leaving their acquisition to actual experience, or rather to a system of experiments, and the result was the establishment of a most cumbersome and costly system of appeals from one court to another—in fact, to a series of courts. The learned Reader remarked that under peculiar circumstances the ancient people of India were induced to withdraw

the legislative power from the hands of the executive and entrust it exclusively to the holy sages. He then showed the state of the primitive law, and how at various epochs it underwent alterations at the hands of different compilers and commentators until it became reduced to the form of the five schools prevailing in the present age. The causes which led to this remarkable revolution he thus described on the authority of Rajah Roy. At an early stage of civilisation, after the distinction of castes had been introduced amongst the inhabitants of Hindoostan, the second class, the Kshatryas, were appointed to govern and defend the country, but in consequence of the adoption of arbitrary measures, addiction to despotic practices, and abuse of primitive law, the other classes revolted against the tyranny, and, under the command of the celebrated Parasurama, the son of Jamudagni, and grandson of Bhrigu, the promulgator of the Institutes of Menu, defeated the Royalists, and put to death almost all the males of the tribe. It was then resolved that the legislative authority should in future be confined to the first class, the Brahmins, who were under no pretence to take any share in the government of the State or the management of the revenue, while the second tribe (the Rajpoots) should exercise the executive authority. The sages of the sacred tribe having no expectation of holding, or desire to hold, public offices, or of possessing political power, devoted themselves to literary and scientific pursuits, religious austerities, living in poverty, safe from the agitation produced by the desire of riches and the intrigues and contests for power and ascendancy. Freely associating with all the other tribes, they were able to understand the feelings and sentiments of the community, and to appreciate the justice of their complaints, and thereby to establish such laws as were required, and correct, as their labours proceeded, the abuses that had been created by the second tribe. The obligations the people felt to Parasurama, as well as their veneration for his character, induced them to nominate his grandfather, the sage Bhrigu, as President of the Supreme Legislative Assembly, and Presidents were afterwards appointed to all the other legislative assemblies, as they became established in other parts of the land. This great revolution happened about the end of the twelfth century before Christ, and the legislative assemblies of Bhrigu, Yajnyavalkya, and other sages, met in different parts of the country at or about that time. Taking the latest dates determined by the researches of Jones, Davis, and Colebrooke, as to the eras of the Vedas, and assuming the Institutes of Menu to be, if not of almost coeval date, 300, or even 600 years later, we find that the legislative assemblies spoken of, promulgated their decrees at a period anterior to any system of laws, the Mosaic, perhaps, excepted, of which any remains are extant. These decrees, still in force, with inconsiderable modifications, over one of the most extensive and remarkable divisions of the world, preceded by nearly two centuries the building of Rome and the enactment of the laws of Sparta, by Lycurgus, and by three centuries the revision of those of Athens, by Solon. The Reader then contrasted the causes which



led to the revolution of 1789, in France, with those which led to the revolution amongst the Hindus. In the French cities, and boroughs, and centres of shipping, there existed a system of law founded upon the Roman law. This system of law was antagonistic to the system of law existing in the rural districts of France, the latter, in fact, being almost a perfect embodiment of the feudal law. These contradictory systems were not only antagonistic, but almost inflexible, and, as a consequence thereof, contributed largely to that great conflict of principles, opinions, and interests, which culminated in the revolution of 1789. In England, there were also opposing systems of laws, followed by a different result. We have not been subject to those great revolutions in England, simply because the English law has all been more or less submissive to the Common Law, and the distinction between France and England appears to have been, that each system claimed for itself an entirety in rule and practice, and nominally in principle. In England the Common Law has been in practice, flexible; while decisions have been treated as authoritative, they have not been inexorable. Precedents are held good media and proofs of illustration or confirmation, where they are held to agree with acknowledged principle, but where there is a complex state of facts, our Common Law judges frequently fall back upon what they apprehend to be the spirit of the Common Law, and are guided thereby in their decisions. This flexibility has kept the Common Law practically *pari passu* with the development of society and its actual wants. No one could claim the distinction of scientific law for such a system. But in progress of law, and its adaption to national wants, what has been disparagingly called "judge made law," has often secured this country from that kind of conflict which is so marked and so unfortunate a feature of Hindu and French history. The Reader showed that the Hindu laws might be compared advantageously, not only with the Mosaic laws, but also with the laws framed by Solon on previous models, who had for his guidance the systems of other countries. But they did not admit of a fair comparison with the Institutions of republican Rome, or the more celebrated Institutions of the Empire. The laws of the twelve tables, eulogised as the "Rule of Right" and the "Fountain of Justice," were superseded by the decrees of the Senate, and the annual edicts of the Proæter. The perpetual edict, which was fixed as the invariable standard of Civil Jurisprudence, had no greater permanence than the pre-existing systems. The code prepared by order of Justinian was a compilation from the labours of preceding lawyers, not a pure and original system of jurisprudence like the Institutes of Menu. That code was so unsatisfactory to Justinian himself that it was revoked within six years, and replaced by a new and more accurate edition. A wide disparity is to be expected between the Hindu laws, the production of only one, and that a most remote period, and the Roman jurisprudence, the result of the labours of legislators and the most eminent lawyers, extending over a period of 1800 years, repeatedly recast after long intervals of time, and embracing the laws promul-



gated by the legislature, as well as the decisions of judges and jurisconsults. Notwithstanding all the advantages of the Roman system, it is equally exposed to the censure pronounced on the code of Menu, "that it is not easy to conceive a more rude and defective attempt at the classification of laws than is there presented." Such a defect is unpardonable in the compilers of the Roman laws, who might have better profited by the examples they had in previous codes, but is quite venial in a metrical work of the peculiar character of Menu's Institutes. A code of laws, such as that of Menu professes to be, cannot be compared with the laws of any other country which are known to have been compiled from time to time. Mr. Tagore says, after the expiration of several centuries an absolute form of government again prevailed amongst the Hindus. The first class, amongst whom were the descendants of the sages, having been induced to accept employments in civil and political departments, became entirely dependent on the second (the Rajpoots), and possessed so little consequence and independence that they were obliged to explain away the laws enacted by their forefathers, and to propound new laws according to the dictates of the reigning princes. They became, in fact, merely the mouthpiece of their rulers, and but nominal legislators, and the whole power, whether legislative or executive, was virtually exercised by the Rajpoot kings. Under these circumstances originated the division of the various schools of law which prevailed for nearly 1000 years, until the Mohammedans invaded the country, and, finding it divided amongst hundreds of petty princes, detested by their own subjects, conquered them successively and introduced a despotic system of government, destroying the temples, the universities, and the other sacred and literary establishments of the Hindus. To this change must be ascribed the decline of the arts and sciences, and the subversion of that ancient and remarkable state of civilisation which had existed amongst the Hindus at a time when the greater part of the known world was buried in comparative ignorance. The learned lecturer then pointed out the sources of the law, and the works that were of authority in each of the schools, and the close resemblance between the Hindu system and those of the western world, particularly with regard to the law of adoption and the law of caste. He showed that the Hindus, as far back as the twelfth century before Christ, were by Menu divided into four classes. The ancient inhabitants of Egypt were so divided. The people of Crete were so divided by the laws of Minos. In Attica the people were divided into four classes by Cecrops, and afterwards by Theseus into three, by uniting the sacerdotal and noble. In England we have the aristocracy, the clergy, the gentry, the middle class, or artizan. Mr. Grady treated the subject of Mohammedan law in the same systematic manner, giving a sketch of Mohamet, tracing the sources of the law to the fountain head, and showing the cause of the schisms which led to the division of the two sects, the Soonnahs and the Sheeas, and the points whereon they differed on questions of legal doctrine, and the works which are of authority in each of the schools.

The lecturer then entered into a discussion of the modifications introduced into the native systems of law, and their mode of administration by English positive enactments, and gave a complete and comprehensive narrative of British legislation as applied to the different presidencies, at different periods, from the earliest charter of the first James to the most recent statutes of the present reign. Fulness of detail, clearness of language, and precision of statement marked the learned Reader's handling of the different subjects embraced in this most interesting and erudite lecture.

#### THE HABITUAL CRIMINALS' ACT.

THE Lord Mayor has received the following communication from the Secretary of State for the Home Department.

*Whitehall. Nov. 8, 1869.*

"My Lord,—I am directed by Mr. Secretary Bruce to transmit you a copy of the Habitual Criminals' Act, passed in the last session of Parliament, and to call attention to those of its provisions which affect the police and governors of prisons.

"The Act has been framed with a view to the protection of the public from the depredations of habitual offenders by restraining them from relapsing into their old habits of crime. For this purpose greatly increased powers have been conferred to the police, and Mr. Bruce is sure that you will feel the importance of impressing upon all members of the police force of your jurisdiction the necessity which exists for the utmost vigilance and discretion in the exercise of those powers.

"While the first object of the Act is undoubtedly the speedy apprehension and punishment of these criminals, Mr. Bruce wishes it to be ever borne in mind that its powers can and should be so exercised as not only not to interfere with, but as far as possible to assist, the efforts of those who ever have a desire to return to a honest life by earning an honest livelihood.

"The term 'chief officer of police' applies to any chief constable, head constable, or other chief officer of any county, borough, and place maintaining a separate police force of its own, and in counties it applies as well to superintendents having charge of divisions.

"The following points appear to Mr. Bruce to demand special attention :—

"That the apprehension without warrant of a licence-holder (s. 3) who is suspected to be getting a livelihood by dishonest means; the apprehension of a person subject to the supervision of the police (s. 8) upon a similar suspicion, and the entry without a search warrant (s. 11) into any premises in search of stolen goods, can only be made by a constable or other police officer under the written authority of the chief officer of police as defined above, and a fresh authority must be given in each case which may arise.

"For the better supervision of criminals a register of all persons convicted of crime in Great Britain will be kept in London, and Mr. Bruce has, under the provisions of the 5th section of the Act,

appointed Colonel Henderson, the Commissioner of the Police in the Metropolis, to superintend this register.

"The returns required under the 6th section from the governor of the prison and the chief officer of police of your jurisdiction must be addressed to 'Colonel Henderson, 4, Whitehall-place, London,' and must be made out on the forms which will be supplied by that officer.

"The holder of a licence is no longer required (s. 4) to report himself personally to the police once a month.—I am, my Lord, your obedient Servant.

E. H. KNATCHBULL-HUGESSEN,

"To the Right Hon. the Lord Mayor of London."

#### THE EDMUNDS CASE.

THE arbitrators to whom the Crown's claim against Mr. Edmunds was referred, and to whom also it was referred to make any recommendation to Her Majesty's government on account of any substantive claim of Mr. Edmunds against the Crown, or on account of any claim against the Crown in consequence of the reports of Messrs. Greenwood and Hindmarch, having sat eleven days in public, having taken evidence and heard counsel, have made their award, finding that there is still due from Mr. Edmunds to the Crown 7142*l.* 13*s.* It may be added that this sum of 7142*l.* 13*s.* is independent of, and in addition to, the sum of 7872*l.* 5*s.* 6*d.* refunded by Mr. Edmunds in September, 1864, making in the whole 15,014*l.* 18*s.* 6*d.*

The following is a verbatim copy of the finding of the arbitrators, the Hon. George Denman and Mr. Charles Pollock :—

"We award and adjudge that, on the taking and adjusting of the accounts in the said order referred to, there is due by the said Leonard Edmunds the sum of 8544*l.* 18*s.*, including the sum of 3033*l.* 16*s.* due from him on account of fees and emoluments received by him in respect to the parchments account.

"And we award and adjudge that there are, having regard to all the circumstances, moral grounds for recommending the Government to relieve the said Leonard Edmunds from a part of the moneys due from him on account of the said fees and emoluments received by him in respect of the said parchments account; that is to say, to the extent of 1402*l.* 5*s.*, and we recommend accordingly.

"And we award and direct that the said Leonard Edmunds do pay to Her Majesty the sum of 7142*l.* 13*s.*, being the amount remaining due from the said Leonard Edmunds upon the taking and adjusting of the said accounts, after deducting the said sum of 1402*l.* 5*s.* And as to the said substantive claims brought before us by the said Leonard Edmunds against the Crown, having regard to all the circumstances of the case, we make no recommendation to the Government in relation to any of such claims.

"And as to the said suit in Chancery, we award, adjudge, and decree that neither party has any claim against the other in

respect of any matters in question in the said suit not concluded by the said decree or by this award.

“And we further award and adjudge that each party do pay his own costs, as well of the said Chancery suit as of the reference; and that the Crown and the said Leonard Edmunds do each pay a moiety of the costs of the award.”

A document, dated December 14th, 1869, and signed with the initials of three Lords of the Treasury, and of the then permanent secretary, has been issued, in which their lordships' decision regarding the Edmunds case is indicated. They say that they have had under their consideration the award made by the arbitrators in the suit of the Attorney-General against Edmunds, and the action of Edmunds against Greenwood. By that award it appeared that Mr. Edmunds stood indebted to the public in no less a sum than 8544*l.* 18*s.* In accordance with the recommendations of the arbitrators, their lordships are willing to relieve Mr. Edmunds from the payment of 1402*l.* 15*s.*, referred to in the award as having been received by him in respect to the parchments account; and, with regard to the balance, they direct that the necessary steps be taken for its recovery. They consider it their duty to offer some remarks with reference to a part of the proceedings. Their lordships observed with pain and surprise, during the progress of the suit, the persevering efforts made by Mr. Edmunds to “vilify and misrepresent” the motives of their solicitor, Mr. Greenwood. They take the earliest fitting opportunity of declaring that all such imputations are utterly groundless and unwarrantable. The award made fully justifies the report made by Messrs. Greenwood and Hindmarsh, that Mr. Edmunds had been in the habit of receiving, and appropriating to his own use, sums of money which, in their opinion, belonged to the public. Their lordships deemed it necessary to express their most emphatic condemnation of a part of the defence set up by Mr. Edmunds, namely, that because, in his own opinion, he was insufficiently paid by his settled salary for his services, he was therefore at liberty to put his hand into the till of his office, and help himself to a sum of public money sufficient to satisfy his own views of the value of those services.

#### THE LATE LORD JUSTICE SELWYN.

LORD JUSTICE GIFFARD, on taking his seat in court on the first day of Michaelmas Term, said—“It is impossible that this court can resume its sittings without recurring to that which on this day is doubtless present to the minds of all in both branches of the Profession—namely, the loss we have all sustained by the death of the late Lord Justice Selwyn. He was called to the Bar in 1840, became a Queen's Counsel in 1856, and afterwards attained the office of Solicitor-General, and was appointed to the Bench, having had in these courts a practice of twenty-seven years, successful from the commencement of his career, and not on the whole inferior to that of any of his contemporaries. It was to be expected, therefore, that he would administer the law of which he had so much experience

with ability and decision, nor was that expectation in any respect disappointed. It was my lot, and, I may add, my happiness, to be associated with him as his junior on the Bench, and though that was a few, a very few months only, I may be permitted to say how certain I am that no man could have brought to the discharge of his duties a more complete and ready knowledge, a more manly judgment, a more anxious desire that in every case truth and justice and right should be done. His memory is also dear to us all as that of a true and sincere personal friend."

#### GREEK READINGS.

THE Rev. Dr. Vaughan, Master of the Temple, began his first series of readings in the Greek Testament, on the first day of Michaelmas Term, in the Middle Temple Library; his subject for the term being St. Paul's Epistle to the Colossians. The Master resumed his readings on the first day of Hilary Term, the subject being St. Paul's Epistle to the Galatians. These readings are intended primarily for members of the Inns of Court; they are open also to all clergymen of the Church of England or other communions, and to graduates of any University.

#### LORD JUSTICE CLERK.

LORD JUSTICE CLERK MONCRIEFF opened the lecture session of the Philosophical Institution in Edinburgh with an address on "The union of the Crowns and union of the Kingdoms of Scotland and England." His lordship traced the beneficial effects which had been produced by those two important public events on the progress and social condition of the country. He remarked that it was not without pride that Scotchmen could look at the conditions under which the two countries were originally connected, and at the results which had ensued from our mutual amity.

#### THE IRISH MASTER OF THE ROLLS.

THE Right Honourable Edward Sullivan on taking his seat for the first time in the Rolls Court, said, in the presence of a large attendance of the Bar and others, who were there to greet him:—

"Mr. Sherlock and Gentlemen of the Bar—I cannot take my seat on this bench without shortly adverting to the very melancholy and sudden event which removed from this seat the late Master of the Rolls. I had not as many opportunities as other gentlemen may have had of observing the manner in which he discharged his duties, but some I had, and I feel bound to say that no man appeared to me to have brought to his official duties a more earnest desire to act with impartiality and justice on every occasion. He discharged them with marked courtesy towards every one of either profession who came before him."

#### PUBLIC PROSECUTORS.

THE question of the appointment of official public prosecutors in lieu of the present objectionable system of prosecution by volunteers, continues to excite great attention. At many of the last Courts of



Quarter Sessions this subject was brought forward. In Gloucestershire Mr. Serjeant Pulling, at the request of some of his brother magistrates, went fully into the plan proposed by him in his paper read at the last Social Science Congress. The serjeant was listened to with great attention, most of the influential magistrates of the county being present. It is rumoured that the Government are prepared to deal at once with this important matter.

#### THE INNER TEMPLE HALL.

THE new hall of the Inner Temple is thus described in the *Builder* :—“It occupies the site of the ancient hall of the Knights Templars, but has been greatly extended in all its dimensions. The new hall is ninety-four feet by forty-one feet, and its height to the wall plate is forty feet. The previous hall was seventy feet by twenty-nine feet, and the height of the wall plate twenty-three feet. In rebuilding their hall, the Benchers have availed themselves of the opportunity to greatly extend and improve the domestic offices, to provide commodious robing-rooms, lavatories, &c., for the use of the members and students, and to obtain better clerks’ offices. New offices have also been built for the treasurer, and the Parliament chamber has been increased in size. The exterior masonry is in Portland stone. The interior of the hall is built of the hardest Bath stone. The roof, screen, and wall linings are all executed in wainscot. The hall is warmed and lighted by sunburners in the roof, and by sixteen bracket-lights against the walls. The oriel window at the upper end of the hall is glazed with stained glass in armorial devices. The rest of the windows are glazed ornamentally in leaded lights and plain glass, but it is believed to be the intention of the benchers ultimately to glaze the whole of the windows with richly-coloured devices, illustrative of the history of the Temple.

#### LEGAL PROCEEDINGS AGAINST SOLDIERS.

A WAR Office circular has just been issued on a subject to which certain recent prosecutions have imparted considerable importance. It is dated January 1, 1870, and promulgates regulations for carrying out legal proceedings in connection with the army :—

“1. All offences committed by persons subject to the Mutiny Act against the ordinary criminal code of the country brought to the cognisance of the commanding officer, should forthwith be notified by him to the local police, that the same may be duly investigated by their agency, and punished by the civil criminal tribunals.

“2. Until the Secretary of State directs the solicitor to the War Department to take charge of any legal proceedings, or to reimburse the cost, he will incur no responsibility on account thereof.

“3. When authority is sought to commence or to defend legal proceedings either in the name or on behalf of the Secretary of State, a full statement of the facts must be sent up to the Under-Secretary of State, authenticated by the head of the department at home or by the general officer abroad.

“4. Where officers or soldiers are made defendants in civil or



criminal proceedings, the defence thereof will be conducted upon the sole responsibility of such defendant, until the decision of the Secretary of State is given.

"5. When, in such cases, any claim is preferred to the Secretary of State for assistance in or for the reimbursement of the cost of the defence, it must clearly be shown with reference to the declaration or indictment (of which a copy should be sent with the application), that the act complained of was one sanctioned by competent authority or clearly within the prescribed course of the defendant's duty.

"6. At home, in cases of murder, where the accused and the deceased were both subject to the Mutiny Act, the commanding officer will request the magistrates forthwith to transmit a copy of depositions taken before them to the War Office, that the case may (if the Secretary of State deems it expedient that a more speedy trial of the accused should be had than the usual course of practice allows) be prepared for trial by the solicitor to the department; under the jurisdiction in Homicides' Act, 1862.

"7. Abroad, where the adoption or the defence of legal proceedings cannot wait the previous sanction of the Secretary of State, they should only be taken on the special authority of the general officer commanding, to whom a report of the circumstances of the case, together with a statement showing the probable expenses, will be addressed by the head of the department on whose recommendation the legal proceedings are proposed to be taken.

"8. These reports, together with the letter of the general or other officer commanding, authorising legal proceedings, will be forwarded by the head of the department concerned to the Secretary of State for War for approval; and in no case will the expenses incurred be admitted as a charge against the item for 'law charges,' vote 17, unless they have received such approval.

"9. When legal proceedings have been authorised, the head of the department concerned will from time to time furnish the legal adviser of the War Department with such information and assistance as he may require, and keep the Secretary of State advised as to the course being pursued."

The other clauses relate to the charges of legal advisers, &c.

#### THE GRAND JURY SYSTEM.

ON a paragraph referring to the grand jury system in the report of the committee appointed by the Middlesex magistrates to consider the question of expediting the despatch of the criminal business of the county, which stated that attention had been directed to the fact that the present system of sending cases before grand juries tended to delay the trial of prisoners, and that, in the opinion of the committee, the administration of justice at the Quarter Sessions would be much facilitated by the withdrawal of cases awaiting trial from the cognisance of the the grand jury, at the quarterly meeting Mr. Serjeant Payne moved the following resolutions:—

"1. That the system of trial by jury, of which the grand jury

forms a part, is a great bulwark of national liberty, especially in political cases, and should be upheld in all its integrity, inasmuch as by the laws of this realm, confirmed by Magna Charta, no person can be put upon his trial for a criminal offence until after indictment found against him by twelve men constituted as a grand jury.

“ 2. That in petty stealings and other small offences which have been investigated by a police magistrate previous to commitment, the proceedings before the grand jury might be much expedited by the assistant-judge pointing out such cases to them as unnecessary to occupy their time further than the returning true bill, in order that the parties may be legally and constitutionally put upon their trials.

“ 3. That by this means the right of a thorough investigation by a grand jury will be preserved in all cases in which it may be deemed important to the public interests.”

Mr. SERJEANT PAYNE having given an historical account of the system, and cited instances in which the innocent had been protected by it, said it seemed to him that the proposition to dispense with trial by grand jury was a very monstrous one. Attempts of the same kind had been made more than once, and to the credit of Sir George Grey be it said he opposed them in his capacity as Home Secretary, and they were defeated, and never obtained the force of law. It was, therefore, with very great surprise that he had heard of the proposition advanced by the committee. In his opinion the grand jury system was of great importance, not only in finding bills against prisoners, but in ignoring indictments in cases where there was not sufficient evidence to send a man for trial.

Sir J. C. LAWRENCE seconded the motion, and observed that from his own magisterial knowledge he had no hesitation in saying that the grand jury system was the greatest possible security to the rights and liberties of the people.

Mr. Serjeant Cox said he had very considerable experience in reference to the trial of accused persons sent to that Court, and he had come to the conclusion that it would be impossible to abolish the grand jury system entirely. He thought, however, there were a great many cases in which the preliminary investigations made by a grand jury were altogether unnecessary, and that there were other cases in which it was required, and he did not think that it would be difficult for the Legislature to define the class of cases in which inquiry ought to be made. It was well known that a Bill was about to be brought before Parliament for the purpose of regulating the principle upon which the whole system of grand juries was founded, and he would suggest that the motion before the Court should be postponed until they saw what course the Legislature intended to pursue on the subject.

After some observations from Mr. R. N. Phillips, Mr. Twentymen and Mr. Turner, Mr. Serjeant Payne withdrew his motion.

It may be remembered that in the *LAW MAGAZINE AND REVIEW* of February, 1869, in an article entitled, “Considerations on the facilitating Proceedings in Criminal Matters,” this subject was care-

fully discussed, and attention was drawn to a clause in the Bill for Regulating the Police Courts of the Metropolis, 1839, by which a magistrate might order an indictment to be prepared, the presentment of which by the chief clerk would have the same effect as if it had been found by a grand jury. We believe this would work well, more especially if there was a provision enabling a prisoner to demand a grand jury. It would lessen the labour of judges and grand jurors, while it would frequently prevent the miscarriage of justice. We have known cases where a prisoner would gladly have pleaded guilty before the magistrates, but they, being of opinion the charge was too important to be dealt with summarily, sent the case before the grand jury, who having misunderstood the evidence found no bill, and the prisoner, to his great astonishment, was discharged.

#### SPRING CIRCUITS OF THE JUDGES.

THE spring circuits are settled as follows, viz.: Home — Chief Justice Cockburn and Mr. Justice Keating; Northern—Mr. Justice Willes and Mr. Justice Brett; Western—Lord Chief Baron and Mr. Justice Hannen; Midland—Mr. Justice Montague Smith and Mr. Baron Cleasby; Oxford—Mr. Baron Martin and Mr. Justice Lush; Norfolk—Mr. Justice Byles and Mr. Justice Blackburn; South Wales—Lord Chief Justice Bovill; North Wales—Mr. Baron Channell. Mr. Baron Pigott remains in town.

#### MR. JOHN TIDD PRATT.

MR. JOHN TIDD PRATT, for many years registrar of friendly societies, died at 29, Abingdon Street, S.W., in his seventy-second year, on January 9th. The deceased gentleman was called to the Bar at the Inner Temple in 1824, and in addition to his office as registrar of friendly societies, held a post in the National Debt Office, and was the barrister appointed to certify the rules of savings banks. He was the author of "Laws relating to Friendly Societies," "A Collection of the Public General Statutes," "The History of Savings Banks," "The Laws of Highways," "An Analysis of the Property Tax Act," "Suggestions for the Establishment of Friendly Societies," and other works of a similar character. In the latter years of his life he rendered efficient service to the public in disclosing, so far as official restraint would permit him, the unsound condition and business of some of the benefit, friendly, and similar societies.

#### MR. T. B. BURCHAM.

MR. PARTRIDGE, on taking his seat in the Southwark Police Court on the Monday following, thus alluded to the death of Mr. Burcham:—"It is my painful duty to have to mention that shortly after I left the Bench on Saturday evening last the melancholy intelligence reached me that my colleague, Mr. Burcham, was no more. He died at his residence on Saturday afternoon at half-past one, after a painful and lingering illness, which he bore with the utmost fortitude and resignation. In spite of his bodily infirmities he manfully struggled to the last to discharge his public duties. My late lamented

colleague was a refined and elegant classical scholar, an able lawyer, and a humane and impartial magistrate. His decisions were regarded with the greatest confidence. He was deservedly esteemed throughout his district by both rich and poor, and I should fail to do justice to my own feelings if I did not pay this last tribute of respect and regard to his memory." The deceased magistrate, Mr. Thomas Borrow Burcham, M.A., was sixty-one years of age. He was educated at the Norwich Grammar School, when the late Dr. Valpy was head master. He entered Trinity College, Cambridge, where he graduated as B.A. in 1830, and in 1832 was elected fellow of his college. He was called to the Bar at the Inner Temple in 1843, and selected the Norfolk circuit. He was for some years one of the classical examiners, and an examiner of mental philosophy in the London University, both of which he resigned on his appointment as magistrate at the Southwark court, on the death of Mr. Gilbert Abbott à Becket, in 1856. He also resigned his recordership of Bedford at the same time.—*Law Times*.

#### CONSULAR JURISDICTION IN EGYPT.

A TELEGRAM dated Cairo, January 3rd, states that the International Commission for reforming the jurisdiction of the Consular Courts in Egypt has elected a committee, consisting of the English, Austrian, French, and Italian representatives. Nubar Pasha has been appointed president. The committee has accepted as the basis of its deliberations a system of three courts of justice, to be established at Alexandria, Cairo, and another place. A court of appeal is to be fixed at Alexandria, and a court of last appeal at Cairo. European judges will be appointed for five years, and paid by the Egyptian Government.

#### MR. W. M. BEST.

WE deeply regret to announce the death of Mr. William Mawdesley Best, which occurred rather suddenly on the morning of November 17th. Mr. Best was called to the Bar in June, 1834, and therefore had been a member of the profession for a very long period of years. He was a member of the Home Circuit, and had been elected a Bencher of Gray's Inn some few years before his death. He had been educated at Trinity College, Dublin.

Mr. Best had not a practice at the Bar at all in proportion to the powers of his mind and the breadth and depth of his learning. In a profession so peculiar to its character as the Bar, we must expect to find many examples of men whose intellectual qualities give them the fairest claims to wealth and fame, but who yet do not succeed in obtaining those objects of human ambition. It is not necessary to speculate on the *raison d'être* of such examples, but it is by no means difficult to explain them. The fact that Mr. Best was the author of the treatise on evidence, which is perhaps the most scientific legal work of the present century, failed to rally clients to his standard; but though he did not become 'distinguished' in the ordinary sense of the term, he has achieved a

reputation capable of surviving that of many "brilliant" advocates. Mr. Best was also known as the colleague of Mr. George James Philip Smith in the publication of the series of reports in the Queen's Bench commencing in Easter Term, 1864, and succeeding the series known as "Ellis and Ellis." On the sitting of the Court of Queen's Bench on Wednesday last, the Lord Chief Justice made the following observations on the death of Mr. Best:—"It will not be out of place to take notice of the communication which has just been made to us of the death of one of the reporters of this Court—Mr. Best—and to express our great regret at the loss which the profession has sustained, as well as our sense of the fidelity, accuracy, and ability with which he discharged his duty as authorised reporter of this Court, in conjunction with his colleague, who, I am glad to say, still remains among us. The manner in which the duty has been discharged has given us the greatest satisfaction."—*Law Journal*.

#### ELECTION JUDGES.

THE Judges for the trial of Election Petitions in England, for the ensuing year will be, Mr. Justice Mellor, Mr. Justice Byles, and Baron Bramwell. Those for Ireland, The Right Hon. Mr. Justice Fitzgerald, the Right Hon. Mr. Justice Morris, and the Hon. Baron Hughes.

WE regret we have not space in this number to refer to the three Scotch Judges and Mr. Justice Hayes, recently deceased. In our next we hope to be able to give a sketch of the life of each.

#### CALLS TO THE BAR.

##### *Michaelmas Term.*

INNER TEMPLE.—Lacklan Mackintosh Rate, Esq., M.A., Cambridge; Charles Septimus Medd, Esq., M.A., Oxford, Certificate of Honour, first class, awarded in this present Michaelmas Term; William Whitley, Esq., Cambridge; Henry Arthur Maylett, Esq., Evans, Esq., Rudolph Herries Spearman, Esq., Oxford; Francis Mills, Esq., M.A., Oxford; Francis Michael Ellis Jervoise, Esq., B.A., Oxford; Walter Freeman Hunt, Esq., B.A., Cambridge; Henry Aloysius Stoke Stackle, Esq., Thomas Alexander Aparcar, Esq., Cambridge; William Edwardes Henniker Forsyth, Esq., B.A., Cambridge; Henry John Bardwell Thwaites, Esq., B.A., Cambridge; George Candy, Esq., M.A., Oxford; William Wybergh, Esq., Gualter Craddock Griffith, Esq., George Ernest Wright, Esq., B.A., Cambridge; William Reynell Anson, Esq., M.A., Oxford; William Henry Hackblock, Esq., B.A., Cambridge; Samuel Porter Foster, Esq., B.A., Cambridge; Robert Grant Webster, Esq., B.A., Cambridge; Samuel Leigh Taylor, Esq., B.A., Cambridge; Courtenay Tracy, Esq., LL.B., Cambridge; The Hon. Robert St. John Fitz Walter Butler, B.A., Dublin; Francis Culling Carr, Esq., James Patrick Hadow Esq., B.A., Oxford; Benjamin Eyre, Esq., B.A., Dublin; Edward Arundel Geare, Esq., B.A., Cambridge; Charles



Thomas Dyke Acland, Esq., M.A., Oxford; Henry Hodgson Bremner, Esq., Cambridge, holder of an Exhibition awarded in July last; William Henry Lockhart Gordon, Esq., B.A., Cambridge; and William Arnold Lewis, Esq.

MIDDLE TEMPLE.—Thomas Brett, Esq., scholar, student, and A.B., Trinity College, Dublin, LL.B., London University, holder of Exhibitions in Real Property and Equity, July, 1868, and of a Certificate of Honour awarded by the Council of Legal Education, Michaelmas Term, 1869; Edmund Philip Greening, Esq.; Thomas Burfield, Esq., LL.B., Trinity Hall, Cambridge; Edward Beal, Esq., B.A., Trinity Hall, Cambridge; Richard Egerton, Esq., B.A., Junior Student, Christ Church, Oxford; Henry Bowles Franklyn, Esq., of the Universities of London and Paris, and Associate of King's College, London; Edward Russell Withers, Esq.; Sydney Grundy, Esq.; Henry Thomas Webb Greene, Esq., B.A., Trinity Hall, Cambridge; Ernest Carpmael, Esq., of St. John's College, Cambridge; John Edward Noet, Esq.; James Mudie, Esq.; Noel Huntingdon Paterson, Esq., B.A., St. John's College, Oxford; Charles Pavin Bird, Esq.; Thomas Howes Roberts, Esq.; James Francis Oswald, Esq., of St. Edmund Hall, Oxford and Stanes Bocket, Henry Chamberlayne, Esq., of Christ Church, Oxford; Right Hon. George Young, Q.C., Lord-Advocate of Scotland.

LINCOLN'S-INN.—Charles Henry Turner, Esq., University of London, holder of the Exhibition at the general examination of the Michaelmas term, 1869, also exhibitor for Advanced Common Law in July, 1868; for Advanced Equity in July 1869; and for Advanced Real Property Law, &c., in the same year; Joseph Alexander Shearwood, Esq., Cambridge, B.A., Certificate of Honour, Michaelmas Term, 1869; Everard Thomas Luck, Esq., Cambridge, B.A.; Henry Lucas, Esq.; William John Anderson, Esq., Oxford; George Royer Dick, Esq., Cambridge, M.A.; Reginald James Mure, Esq., Oxford, B.A.; James George Wood, Esq., Fellow of Emmanuel College, Cambridge, M.A.; William Stephen, Esq., late of M'Gill College, Montreal; Frederic George Luke, Esq., Cambridge, B.A.; Frederick William Groves, Esq., London, M.A.; George Nichols Marcy, Esq.; Henry Martin Taylor, Esq., Fellow of Trinity College, Cambridge, M.A.; Thomas Henry Carson, Esq., Dublin, B.A.; and Limjee Nowrojee Bunnajee, Esq., London.

*Hilary Term, 1870.*

MIDDLE TEMPLE :—Frederick Augustus Knight, Esq.; Alexander Nevay, Esq., of the Scotch Bar; Hugh William Boyd Mackay, Esq., LL.B., Trinity College, Dublin (of the Irish Bar); Alfred Chichele Plowden, Esq., B.A., Brasenose College, Oxford; John Jepson Atkinson, Esq., Exeter College, Oxford; William Warden, Esq., B.A., Exeter College, Oxford; Andrew Duncan, Esq., B.A., Pembroke College, Cambridge; Donald Ninian Nicol, Esq., B.A., Queen's College, Oxford; James Stoddart Porteous, Esq.; William Archbutt Pocock; Henry Rogers Beor, Esq., B.A., St. John's College, Cambridge; George Jarvis



Notcutt, Esq.; Joseph Haworth Redman, Esq.; John Raymond, Esq.; Henry Forester Leighton, Esq.; James Samuelson, Esq., of New Inn Hall, Oxford; George Francis Travers Drapes, Esq., B.A., LL.B., Trinity College, Dublin; Albert Lewis, Esq.; Remy Ollier, Esq.

INNER TEMPLE:—Arthur Denman Smith, Esq., LL.B., Cambridge; Edward Ripley, Esq., B.A., Oxford; Charles Elsley, Esq., B.A., Cambridge; Frederic Ayres, Esq., Cambridge; Louis Henry Phillips, Esq.; Henry Mills Skrine, Esq., B.A., Oxford; Mervyn Standish De Montmorency, Esq., B.A., Oxford; Peter Burrowes Hutchins, Esq., B.A., Oxford; Ludlow Handcock, Esq., B.A., Dublin; William George Huband, Esq., B.A., Dublin; John Henry Oglander Glynn, Esq., LL.B., Cambridge; Carlile Henry Hayes Macartney, Esq., B.A., Cambridge; Robert Charles Paxton, Esq., B.A., Cambridge; John Amphlett, Esq., Oxford; Leopold John Manners De Michele, Esq., Cambridge; Robert Wilbraham Jones, Esq.; the Hon. Dudley Oliphant Murray; William Jerrold Dixon, Esq.; Edward Herbert Draper, Esq., B.A., Cambridge; William Blagdon Gamlen, Esq., B.A., Oxford; Edward Stanley Robertson, Esq., B.A., Dublin; Francis Edward Cunningham, Esq., B.A., Cambridge; William Heurtley Newnham, Esq., B.A., Oxford; Charles Gould, Esq.; George Gumbleton, Esq., M.A., Oxford; and John von Sonnentag De Havilland, Esq.

## BAR EXAMINATION.

*Michaelmas Term, 1869.*

At the general examination of students of the Inns of Court, held at Lincoln's-inn Hall, on the 28th, 29th, and 30th October, and the 1st November, 1869, the Council of Legal Education awarded to George Lewis, Esq., student of the Middle Temple, a studentship of 50 guineas per annum, to continue for a period of three years; Charles Henry Turner, Esq., student of Lincoln's-inn, an exhibition of 25 guineas per annum, to continue for a period of three years; Thomas Brett, Esq., student of the Middle Temple, Joseph Alexander Shearwood, Esq., student of Lincoln's-inn, and Charles Septimus Medd, Esq., student of the Inner Temple, certificates of honour of the first class.

George Candy, Esq., student of the Inner Temple, Henry Bowles Franklyn, Esq., student of the Middle Temple, Thomas Goodman, Esq., student of the Middle Temple, William Meigh Goodman, Esq., student of the Middle Temple, Frederick William Groves, Esq., student of Lincoln's-inn, James Cholmondeley Kaufmann, Esq., student of the Inner Temple, Henry Forester Leighton, Esq., student of the Middle Temple, Frederic George Luke, Esq., student of Lincoln's-inn, James Mudie, Esq., student of the Middle Temple, and George Jarvis Notcutt, Esq., student of the Middle Temple—certificates that they have satisfactorily passed a general examination.

**EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.***Michaelmas Term, 1869.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts the examiner recommended the following gentlemen under the age of twenty-six, as being entitled to honorary distinction :—Henry Summer Sewell; William Frederick Beardsley; Francis William Sancroft Damant; John Rayner Cooper; Theodore Lumley; Charles Cornish Brown.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—To Mr. Sewell the prize of the Honourable Society of Clifford's Inn; to Mr. Beardsley, the prize of the Honourable Society of Clement's Inn; to Mr. Damant, Mr. Cooper, Mr. Lumley, and Mr. Brown, prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, under the age of twenty-six, passed examinations which entitle them to commendation :—John Seymour Fowler; Arthur Crabtree Procter; Edmund Theodore Radcliff; Higson Simpson.

The council have accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to certificates of merit if they had not been above the age of twenty-six :—William Boycott; George Stuart Evett, B.A.; Robert Martin; James Midgeley; George Presswell.

The examiners also reported that among the candidates from Liverpool in the year 1869, Mr. J. S. Fowler passed the best examination, and was, in the opinion of the examiners, entitled to honorary distinction; that Mr. M. P. Jones and Mr. J. W. Alsop, B.A., were respectively second and third in order of merit among the candidates from Liverpool in the year 1869, and were, in their opinion, entitled to honorary distinction.

The council have therefore awarded to Mr. Fowler, Mr. Jones, and Mr. Alsop respectively the prize, consisting of a gold medal, founded by Mr. Timpron Martin, of Liverpool.\*

The gold medal founded by Mr. John Atkinson, for candidates from Liverpool or Preston, who have shown themselves best acquainted with the law of real property, and the practice of conveyancing, has been also awarded to Mr. Fowler, Mr. Jones, and Mr. Alsop respectively.

The examiners also reported that among the candidates from Birmingham in the year 1869, Mr. E. T. Ratcliff was entitled to honorary distinction.

The council have accordingly communicated this report to the Birmingham Law Society.

\* The prizes awarded to Mr. Jones and Mr. Alsop were withheld in the years 1867 and 1868.

Mr. Courtney Stanhope Kenny having, among the candidates in the year 1861, shown himself best acquainted with the law of real property and the practice of conveyancing, the council have awarded to him the prize, consisting of a gold medal, founded by Mr. Francis Broderip, of Lincoln's-inn.

The number of candidates examined in this term was 120; of these 113 passed, and seven were postponed.

#### APPOINTMENTS.

THE honour of knighthood has been conferred on Mr. Roger Therry, for many years a Judge of the Supreme Court of New South Wales.

The honorary degree of D.C.L. has been conferred on the Right Hon. John Robert Mowbray, M.P.

The following gentlemen have been appointed Her Majesty's counsels :—Mr. A. R. Adams, Mr. W. C. Fooks, Mr. A. S. Eddis, Mr. D. Brown, Mr. H. F. Bristow, Mr. P. H. Edlin, Mr. Thomas Hughes, Mr. Joseph Kay, Mr. M. Bere, Mr. Henry James, Mr. H. C. Lopes, Mr. Osborne Morgan, Mr. Edward Fry, and Mr. S. Pope.

Mr. Henry J. Sumner Maine, LL.D., late Legal Member of the Council of India, has been elected to fill the new Professorship of Jurisprudence in the University of Oxford.

Mr. T. K. Lowry, Q.C., late a District Judge at St. Ann's and St. Mary's, in the island of Jamaica, has been appointed to the Prothonotaryship of the new District Court at Manchester, under the Act of last session.

Mr. Franklin Lushington has been appointed to the police magistracy, vacated by the death of Mr. Burcham.

Mr. R. R. W. Lingen, of Lincoln's Inn, has been appointed permanent secretary to the Treasury, in succession to the Right Hon. G. A. Hamilton.

Sir Francis H. C. Doyle, Bart., of the Inner Temple, has been appointed a Commissioner of Customs in the room of the late Mr. Ralph W. Grey.

Mr. G. W. Dasent, D.C.L., of the Middle Temple, has been appointed by the Government to the post of Civil Service Commissioner.

Mr. J. F. Collier, of the Western Circuit, has been appointed Recorder of Poole, in the place of Mr. Bullar deceased; Mr. S. B. Bristowe, of the Midland Circuit, Recorder of Newark; and Mr. F. J. Smith, of the Home Circuit, Recorder of Margate.

Mr. Wales C. Hotson, barrister-at-law, of the Norfolk Circuit, has been appointed by the Dean and Chapter of Norwich, to be capital coroner within their liberties, and a justice of the peace for the cathedral precincts, in the room of the late Chancellor Evans, deceased, and he has also been appointed a surrogate or deputy of the Chancellor of the diocese of Norwich.

Mr. Aldridge and Mr. Sykes, the official solicitors under the Bankruptcy Act of 1861, have been appointed by the Lord

Chancellor the official solicitors under the new Act of 1869, in all cases where no trustee shall be appointed and during any vacancy in the office of trustee, and to act generally for the registrars of the Court in cases where their services may be required.

Mr. Mansfield Parkyns, one of the official assignees of the Old Court of Bankruptcy, has been appointed controller in Bankruptcy.

Mr. T. D. Brogden, barrister-at-law, has been nominated to a law studentship at St. John's College, Cambridge.

Mr. William Sutton Page, solicitor, has been appointed clerk to the Commissioners of Income Tax acting in and for the district of the city of Norwich, in the room of Mr. R. Field, deceased. Mr. William Thomas Bensly, LL.D., solicitor, Chapter Clerk to the diocese of Norwich, in succession to the late Mr. John Kitson. Mr. Henry Greene, Deputy-Recorder and Steward for the borough of Higham Ferrers, on the resignation of Mr. George Burnham. Mr. Arthur Burch, solicitor, Secretary to Dr. Temple, the Bishop of that diocese. Mr. Charles Berkeley Margetts, solicitor, Registrar of the Huntingdon County Court, in succession to the late Mr. Charles Margetts. Mr. John Watson, Mayor of Durham, Clerk of the Magistrates for the Petty Sessional Division, in the room of Mr. J. W. Hays, resigned. Mr. W. M. Mortimer, solicitor, Registrar of the Newcastle-on-Tyne County Court, in the place of Mr. John Clayton, resigned. Mr. J. H. Poyes, solicitor, Coroner of Margate. Mr. Ralph Bayshaw, Junr., Deputy-Coroner for the Northern Division of the County of Warwick, in the room of the late Mr. Blagg. Mr. Thomas Llewellyn, solicitor, Clerk to the Justices of the Burslem and Tunstall Divisions, in the room of Mr. J. R. Rose, deceased. Mr. Francis W. Jones, solicitor, Clerk of the Peace for the city of Gloucester and county, in the room of the late Mr. Charles Smallridge. Mr. Thomas Mallam, solicitor, Clerk to the Magistrates of Oxford, in the room of the late Mr. Henry Jacob, deceased. Mr. B. Campbell, solicitor, Clerk to the Magistrates of the Warwick District, in the room of the late Mr. F. Tibbits. Mr. Arthur Wilson, solicitor, Clerk to the Magistrates of the Banbury District, in the place of the late Mr. T. G. Judge. Mr. E. J. C. Davies, solicitor of Crickhowell, Clerk to the Magistrates of the Blackwood Division of the County of Brecon, in the room of the late Mr. Watson, deceased. Mr. E. C. Peele, solicitor, Town Clerk of Shrewsbury, in the room of Mr. J. J. Peele, resigned. Mr. H. T. Sankey, solicitor, Clerk of the Peace for the Borough of Margate. Mr. R. J. Walker and Mr. Frederick Butler, Joint Clerks to the Magistrates of the Manchester Division, in the room of the late Mr. W. S. Rutter. Mr. F. J. Chester, solicitor, Clerk to the Newington Vestry, in the room of the late Mr. Henry Chester. Mr. A. H. Hunt, solicitor, Clerk to the Guardians of the Orsett Union. Mr. George Wire, solicitor, Clerk to the Dorrington Turnpike Trustees. Mr. Joseph Harker, solicitor, Clerk to the Burial Board of Poole, Dorset. Mr. George Harper and Mr. F. L. S. Safford, solicitors, Clerk to the

Local Board of Hadleigh. Mr. T. E. Paget, solicitor, District Prothonotary at Liverpool. Mr. R. Y. Green, solicitor, Under-Sheriff of Newcastle-upon-Tyne. Mr. A. R. Rollitt, LL.D., solicitor, Under-Sheriff of Hull. Mr. Frederick Cobbett, solicitor, Under-Sheriff for Worcester. Mr. F. T. Keith, solicitor, reappointed Under-Sheriff for the city of Norwich. Mr. George Brown, solicitor, Under-Sheriff for York. Mr. David H. Owen, solicitor, District Registrar of the Court of Probate at Norwich, in the room of Mr. John Kitson, deceased.

**IRELAND.**—The Right Hon. Edward Sullivan, Attorney-General, has been appointed Master of the Rolls, in the room of the Right Hon. J. E. Walsh, deceased.

Mr. C. R. Barry, Solicitor-General, has been appointed Attorney-General, in succession to the Right Hon. Edward Sullivan, appointed Master of the Rolls.

Mr. Edward Barry has been appointed Secretary to the new Master of the Rolls.

Mr. William C. Mulholland, barrister at-law, has been appointed a Circuit Crown Prosecutor, on the North-east Circuit, for the County of Monaghan.

Mr. Michael Francis Dwyer, barrister-at-law, has been appointed Chief Registrar in the Registry of Deeds Office, in the place of Mr. Morgan O'Connell, resigned.

**SCOTLAND.**—Mr. William Lamond, Advocate, has been appointed Sheriff-Substitute of Fifeshire at Dunfermline, in room of Mr. Beatson Bell, transferred to Cupar to fill up the vacancy occasioned by the resignation of Mr. Taylor.

Mr. Robert Laidlaw Stuart, W.S., has been appointed Procurator-Fiscal for Mid-Lothian in the place of Mr. Maurice Lothian, resigned.

**INDIA.**—Mr. Fitzjames Stephen, Q.C., has been appointed Legal Adviser to the Indian Government, in the place of Mr. Mayne, who returns superannuated.

Mr. J. F. Marsden has been appointed to officiate as Professor of English Law in the Presidency College, Madras, in the absence of Mr. J. A. Branson.

**JAMAICA.**—John Lucie Smith, Esq., has been appointed Chief Justice of the Island of Jamaica.

Mr. Constantine Brooke, solicitor, has been appointed Crown Solicitor to the Government of Jamaica.



## *Neurology.*

### *September.*

23rd. COMBE, Matthew, Esq., Barrister-at-Law, aged 46.

### *October.*

14th. MANOR, Lord, a Judge of the Scotch Court of Session, aged 67.

15th. HAWKINS, R. R. A., Esq., Barrister-at-Law, aged 55.

19th. ROTHERY, Charles F., Esq., Barrister-at-Law, Assistant-Judge of the Colony of the Bahamas.

29th. PACKWOOD, George, Esq., Solicitor, aged 47.

30th. JUDGE, T. G., Esq., Solicitor, aged 51.

31st. SHOARD, J., Esq., Solicitor, aged 32.

### *November.*

2nd. HOOLE, Francis, Esq., Solicitor, aged 69.

5th. HULME, J. Hilton, Esq., Solicitor.

5th. WATKINS, J. Gregory, Esq., Barrister-at-Law, aged 32.

6th. WALKER, John, Esq., Q.C., aged 74.

13th. PRITCHARD, Henry, Esq., Barrister-at-Law, aged 31.

13th. TIBBITTS, Frank, Esq., Solicitor, aged 45.

16th. GREGORY, J. Philip, Esq., Barrister-at-Law.

16th. BEST, W. Mawdesley, Esq., Barrister-at-Law.

18th. IFILL, Benjamin, Esq., Barrister-at-Law.

20th. WORMALD, William, Esq., Solicitor, aged 48.

22nd. SMALLRIDGE, Charles, Esq., Solicitor, aged 69.

24th. WALESBY, Joshua, Esq., Solicitor.

24th. NICHOLL-CARNE, R. C., Esq., Barrister-at-Law, aged 63.

27th. BURCHAM, T. Barrow, Esq., Stipendiary Police Magistrate, aged 62.



27th. HOOKER, Edward, Esq., Solicitor, aged 77.

28th. BLOOME, Matthew, Esq., Solicitor.

28th. SNELL, E. H. T., Esq., Barrister-at-Law, aged 28.

*December.*

1st. LAWTON, George, Esq., Solicitor, aged 90.

1st. YOUNG, Henry, Esq., Solicitor, aged 72.

7th. ROSE, J. Randolph, Esq., Solicitor.

9th. BASEVI, Nathaniel, Esq., Barrister-at-Law, aged 77.

9th. REMER, Joseph, Esq., Solicitor, aged 58.

10th. SHUGAR, George, Esq., Solicitor, aged 42.

13th. THOMPSON, Richard, Esq., Solicitor, aged 59.

13th. ELLISON, Peregrine G., Esq., Solicitor, aged 82.

18th. BAINBRIDGE, William, Esq., Barrister-at-Law, aged 60.

16th. JACOBS, Henry, Esq., Solicitor, aged 79.

16th. WILLIAMS, Robert, Esq., Solicitor, aged 38.

17th. BRADFIELD, J. Edwin, Esq., Junior, Solicitor, aged 28.

24th. CRIGHTON, A. Clifford, Esq., Solicitor.

24th. ELDRIDGE, William, Esq., Barrister-at-Law, aged 67.

28th. JACKSON, G. F., Esq., Solicitor, aged 33.

*January.*

1st. WATTS, A. Eugene, Esq., Solicitor.

2nd. MOORE, Richard, Esq., Solicitor, aged 49.

2nd. CLARKE, Rupert, Esq., Solicitor, aged 61.

2nd. DEARDEN, T., Ferrand, Esq., Solicitor, aged 67.

3rd. ABRAHAM, George F., Esq., Solicitor, aged 88.

5th. BULLAR, Henry, Esq., Barrister-at-Law, aged 54.

9th. PRATT, J. Tidd, Esq., Barrister-at-Law, and Registrar of  
Friendly Societies, aged 72.

11th. DUCKETT, T. Morton, Esq., Barrister-at-Law, aged 52.

12th. ELMERS, Thomas, Esq., Barrister-at-Law, aged 40.

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THE  
*Law Magazine and Law Review* :  
OR  
QUARTERLY JOURNAL OF JURISPRUDENCE.

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No. LVII.

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ART. I.—THE CIVIL CODE OF NEW YORK.

BY T. L. MURRAY BROWNE.

WE have on two previous occasions adverted at some length to the Codes of New York. These, as our readers may remember, are five in number. Of these five, two, viz., the Code of Civil Procedure and the Penal Code, have been already reviewed. A third, the Civil Code, forms the subject of the present essay. There remain only the Political Code, and the Code of Criminal Procedure. The two last-named are, to Englishmen, the least important and interesting of the number. The title of the Political Code is, indeed, attractive. In truth, however, it is confined to points of internal administration of comparatively little interest to foreigners. Nor does the Code of Criminal Procedure call for any lengthened notice at our hands. The present article will, therefore, in all probability, conclude the subject. Such being the case, it may be convenient briefly to recapitulate what has been said on previous occasions.

In our number for August last we explained the various steps by which the Codes of New York were brought into

being, and made some observations upon their general character. We pointed out that, although the Code of Civil Procedure had, in an incomplete form, passed into law, this was not the case with any of the other Codes, which, therefore, remained mere reports of the commissioners appointed to prepare the same, devoid of any legislative authority. We then examined, at some length, the Code of Civil Procedure, and compared it with the judicial system recommended by the Judicature Commissioners of this country. We ventured to express our approbation of the principles upon which the Code is founded; but were compelled to comment upon the fact that, in almost every year since the enactment of the Code, an amending Statute had been passed, and that the number of reported decisions upon points of practice under the Code was enormous. In conclusion, we expressed an opinion that the Code of Civil Procedure could not be considered successful; and that when tried by the crucial test of actual practice, it had been found wanting.

In our number for November last we reviewed the Penal Code of New York. We also gave some account, in passing, of the Indian Penal Code. We observed that, unlike the Transatlantic Code, the Indian Code was actually in force and working well; and, comparing the two Codes together, we expressed a preference for the latter—the Indian.

It remains to examine the Civil Code of New York. But before doing so, it may be fair to warn our readers that we are not enthusiastic admirers of the New York Codes. We greatly prefer those of India, so far as the latter are at present completed.\* And we cannot but hope, that whenever the task of Codification is really commenced in this country, the Indian rather than the American Code will be regarded as the foundation upon which our efforts should be based. At the same time we have endeavoured to do full justice to the Codes of New York. Our readers will decide whether

\* See p. 10, No. 55.

there be, or be not, any sufficient foundation for such objections as we feel compelled to make to those Codes.

The Civil Code of New York was prepared by a Commission appointed for that purpose by the Legislature, Mr. David Dudley Field being the most prominent of the Commissioners. The work was completed and published in 1865, but no legislative sanction has as yet been given to it. It is not, therefore, in force as law. So much has been said on a previous occasion. We proceed to give some account of the contents and arrangement of the Code.

It must be remembered in the first place that all questions relating to procedure and practice (including the law of evidence), to the penal law, and to the internal government of the State, are comprised in other Codes. There remains to the present Code the vast subject of Civil Law. This may be roughly considered as equivalent to a large portion of the Statute Law of this country, the greater part of our Common Law, and the whole, or almost the whole, of that system of jurisprudence which we call Equity. This enormous mass of material is condensed, as will be seen, into a single volume of no inordinate size.

The Civil Code of New York is comprised in one large octavo volume, certainly rather thick, but printed in large type, with abundant margin and blank spaces. A single volume of the ordinary octavo edition of the Statutes at large frequently equals or exceeds the Code in point of size, and is very much more closely printed. Moreover, the volume before us contains, in addition to the Code proper, an Introduction and Report to the Legislature, a Schedule of Forms, and an Index. Certainly no complaint can be made against the Code on the score of bulk. The Code proper is comprised in 2034 Sections, of a few lines each. These are numbered consecutively from the beginning to the end of the book, without regard to any subordinate divisions. Thus great facility of reference is secured. The Code is elaborately divided and subdivided. It consists in the first place of four

main Divisions, preceded by a few introductory Sections. These Divisions are respectively entitled, Of Persons, Property, Obligations, and General Provisions, and each Division contains two or more Parts. These are subdivided into Titles, the Titles into Chapters, and the Chapters into Articles. The cross-division into Sections runs, as we have already said, throughout the whole.

We are anxious to give our readers some idea of the arrangement upon which the Code proceeds. To explain the arrangement at length would, however, be beyond our limits. We must content ourselves with an enumeration of the principal divisions of the Code in the order in which they occur. This enumeration may, at the same time, enable the reader to acquire a somewhat better idea of the subjects, matter and contents of the work in question. This part of our subject will, we fear, be dry, but it will be short.

The Code is divided into four main DIVISIONS—of Persons, Property, Obligations, and General Provisions. The first DIVISION of the Code, which is entitled Of Persons, consists of three PARTS:—I. Persons. II. Personal Rights. III. Personal Relations. The two first Parts are short. Part III. (of Personal Relations) is more lengthy. It is divided into four TITLES. (1.) Marriage. (2.) Parent and Child. (3.) Guardian and Ward. (4.) Master and Servant. Title I. (of Marriage) is subdivided into three CHAPTERS. (1.) The Contract of Marriage. (2.) Divorce. (3.) Husband and Wife. Chapter I. (of the Contract of Marriage) is again subdivided into two ARTICLES. (1.) Validity. (2.) Authentication. The remaining Titles of Part III. are, where necessary, similarly subdivided. So much for the first Division of the Code.

The second of the four great Divisions is entitled, as we have said, Of PROPERTY. It comprises four Parts, dealing respectively with Property in General, Real or Immovable Property, Personal or Movable Property, and the Acquisition of Property. Part III. (of Personal Property) contains

two Titles. (1.) Personal Property in General; and (2.) Particular kinds of Personal Property. The latter Title is subdivided into five Chapters, some of which are of considerable length. They are respectively (1.) Things in Action; (2.) Shipping; (3.) Corporations; (4.) Products of the mind, such as copyrights; and (5.) Other kinds of Personal Property.

A dry enumeration of headings, such as that on which we are now engaged, is very uninteresting. Our readers are doubtless sufficiently weary of it. We will pass rapidly through the two remaining Divisions of the Code. The first of these Divisions, the third, treats of OBLIGATIONS, and is divided into (1.) Obligations in General; (2.) Contracts; (3.) Obligations imposed by Law; and (4.) Obligations arising from Particular Transactions. The latter subdivision is sufficiently extensive. It includes, amongst other things, Sale, Trust, Agency, Lien (including Mortgage), &c. The fourth great Division (GENERAL PROVISIONS) comprises five Parts, *i.e.*, Relief, Special Relations of Debtor and Creditor, Nuisance, Maxims of Jurisprudence, and Definitions.

A few points may first be noted with reference to the arrangement of the Code. The primary division into the subjects of Persons, Property, Obligations, and General Provisions, is imperfect and unscientific.\* In the hands of the American codifiers it leads to some singular results. Thus, as appears above, corporations are classed as one of the kinds of personal property, a predication which could only be true, as we should imagine, of a corporation sole in the Slave States. At the same time, Judicial Persons are not noticed at all. A more glaring flaw is to be found in the fourth Division of the work. At p. 563, Part I. of the fourth Division is said to be subdivided into four titles, of which Title III. is styled, Of

\* See a pamphlet by Sheldon Amos, Esq., Barrister-at-Law, on Codification in England and the State of New York. Ridgway, 1867.



Specific Relief, and Title IV. Of Preventive Relief. Turning onward to p. 582, we find both Specific and Preventive Relief ranged under Title III; while there is actually no Title IV. at all. Thus, in one portion of the Code, a Title is distinctly enumerated, which has in reality no existence whatever. The slip is not in itself important; but it must be regarded as an instance of serious carelessness—a carelessness which, we regret to say, too often defaces the execution of the work.

Quitting the subject of arrangement, let us pass on to that of the Notes which are appended to the different sections. These contain a variety of miscellaneous matter, including explanations, suggestions for the alteration of the law, &c.\* They also contain frequent references to decided cases, reported in English and American Reports. These are, apparently, the principal authorities in the existing law for the proposition embodied in the section to which they are appended. We do not clearly understand the precise position which these cases are intended to occupy. It might have been thought, by analogy to the illustrative examples of the Indian Code, that the cases were designed to serve as a legislative interpretation of the sections in question. Yet the notes, in general, do not appear to be in any way authoritative; and, on the whole, we incline to think that the cases referred to in the notes are not authoritative either. It is however discreditable to the Code that there should be any possibility of doubt upon so important a point. The effect and authority of the cases should have been precisely defined.

The next question which confronts us is an important one. How was the Code constructed? Was it evolved, *à priori*, from the original principles of jurisprudence, or

\* We may observe in passing, that the notes often contain matter which, in our opinion, should be in the text. See, for example, the notes to ss. 1846, 1875, 1969, 1975, 1982, 1984, 1991.

is it based upon existing law? Undoubtedly the latter. The Code is, in truth, an abstract of the existing law of the State of New York. This law is substantially the same with our own. The Code, therefore, contains comparatively little that is new or is peculiar to itself. Nor has its form been influenced, to any considerable extent, by the Code Napoleon or the Civil Law. It is distinctly founded throughout upon the present law of New York. Upon this point the words of its authors are precise. In the introduction to the Code (p. xv.), they thus describe their task:—

“In other words, a complete digest of our existing law, Common and Statute, dissected and analysed, avoiding repetitions and rejecting contradictions, moulded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the Legislature, is the Code which the organic law commanded to be made for the people of this State.”

To the same effect are the observations of the Commissioners in their Report to the Legislature, which is bound up with the Code itself (p. v.):—

“In the execution of this vast undertaking, the Commissioners have endeavoured to bring together and arrange in order all the general rules known to our law upon the subjects contained within the scope of such a code, *rejecting those which are obsolete or unsuitable to our present condition, and adding such others as appeared necessary or desirable.*”

The last words of the above quotation will aptly introduce the next division of our subject.

The Commissioners have not been mere blind compilers of an abstract. They have remembered that the work upon which they were engaged was a Code, and not a Digest. They have, therefore, in some cases deviated from the existing law for the purpose of effecting certain requisite changes.

Where this has been done, new provisions have of course been inserted in the Code. In these cases, therefore, the enactments of the Code represent original legislation. The Commissioners have, however, availed themselves sparingly of this power of innovation. The changes made, some of which are hereafter mentioned, are indeed, in themselves, important. Yet, when compared with the enormous mass of law embodied in the book, they appear almost insignificant. The student would be surprised to find how very small a portion of the Code is concerned with these alterations. Certainly they in no way neutralise the general character of the work, as a condensed reproduction of the existing law of the State of New York.\* The course pursued in this respect, and the principal changes made, are thus described by the Commissioners themselves. (Report, p. vi.)

“While it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the Constitution to specify such alterations and amendments therein, as they shall deem proper. In obedience to this command of the organic law, they have specified various alterations and amendments, which they consider proper to be adopted. These are mentioned in the notes to the different sections, where the reasons for recommending them are generally given.

“For all these the Commissioners beg leave to refer to the notes themselves. To detail them here would swell this Report to an inconvenient length ; and, therefore, three only will be mentioned. In the first Division the Commissioners have endeavoured to secure the equal rights of married women in respect to their children and their property, abolishing, at the same time, both dower and curtesy ; and they have introduced an article on Adoption, by which they have provided that the substituted parents may have all the rights, and be subject to all the responsibilities of the real one, who,

\* In many cases in which the Code differs from the law of England, it will be found that the variation is due not to the Commissioners, but to a previous alteration in the American law.

having once voluntarily renounced his parental rights, should not be permitted to resume them when the affections have grown into the new relation. In the second Division the Commissioners have aimed at an assimilation, to the utmost extent possible, of the laws of real and personal property, by reducing the law of real estate to the simplicity of personal, wherever it could be done without the disturbance of existing rights, establishing for both the same rules of succession.” \*

In the general wisdom of the changes made by the Commissioners the writer entirely concurs. We must not, however, confound two distinct things. The substance of the law is a very different thing from the expression of it. The changes made by the Code may, in themselves, be good; and yet the Code itself (conceivably) be bad. There are many ways in which the changes in question may be effected; and they may be effected as well by a good Code as by a bad one. All honour to the American codifiers for the judicious boldness with which they have seized the opportunity afforded them of effecting important changes in the law. To initiate such alterations is the work of a legislator. But it is not every able legislator who is equal to the herculean task of codification. How far the New York Commissioners have succeeded in the latter task is a matter upon which opinions may differ. We desire, meanwhile, to caution enthusiastic legal reformers, that they must not jump to the conclusion that *every* Code, which abolishes the distinction between real and personal property, must necessarily be a good one.

We next observe—and the idea must be clearly conceived and carefully remembered throughout the consideration of this subject—that the Code is not exhaustive. It does not

\* In addition to the changes above referred to, the following may be mentioned. Choses in action are made assignable (s. 108). Important changes are introduced into the law of seduction (s. 32), and of joint ownership (s. 176). In the latter branch of law, the right of survivorship is, except under certain circumstances, annulled (s. 179). Other instances of alteration in the law are collected at p. xxxi. of the Introduction to the Code.

profess to contain the *whole* of the future law of the State. On the contrary, it expressly leaves the operation and force of the present law untouched, *except* so far as it is inconsistent with the provisions of the Code. Upon this point the words of the Commissioners are distinct. (Introduction, p: xix.) “If there be an existing rule of law omitted from this Code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists. . . . And if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided: that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code, and therefore still existing, or by the dictates of natural justice.” The existing law is not, therefore, abrogated, except so far as it is inconsistent with the Code. This is, of course, a question of primary importance; and there are many who will strongly protest against this feature of the American Code. According to this school of theorists, a Code should be exhaustive. It ought, from the moment of its enactment, absolutely to repeal and annul all previously existing law upon the subjects comprised within its limits; as is the case, we believe, with the Indian Codes. If omissions are found to exist in the Code, they should be supplied by subsequent legislation. The Code will then furnish a point of commencement, beyond which no legal researches need extend. Otherwise it will be necessary for the lawyer to be acquainted with two distinct systems of law—on the one hand, with the Code; on the other hand, with the previously existing law, whether Common or Statute. Nor will it be safe for him altogether to neglect any portion of the latter, however fully that branch of law may be treated in the Code. For it will be impossible to predict with certainty when, or how, some point of the old law may be introduced to supplement, interpret, or illustrate, the provisions of the Code. We confess that these arguments appear to us to possess great weight. The inclination of our opinion is against the course pursued by the New York Com-

missioners in this respect. And there is another argument which may be adduced against it. We are not disposed to attach undue weight to reasoning based upon the ground of scientific fitness. But, from a scientific point of view, the argument of the school opposed to the Commissioners upon this point appears irresistible. A legal system, which consists partly of a code, and partly of an unascertained residuum of previous law, is necessarily inharmonious, and unscientific. If we are to confront the enormous labour and difficulty which must necessarily attend the introduction of a code, let us at least have the advantage of sweeping away, once and for ever, that vast mass of undigested law, of which we now complain. Of course, the more complete the code, the less is the evil attending the preservation of an indefinite portion of the old law. But, as will be seen hereafter, the New York Code is by no means so complete and accurate as to leave no occasion for a resort to the present law. The motives which led the Commissioners to take the course above described with regard to the preservation of the existing law, are, indeed, unmistakable. The Code compiled by them is so brief and meagre in its character, that to leave the public with no law beside the Code would be nearly equivalent to leaving them without any law at all. But although this consideration accounts for the course pursued, it does not justify it. If the Code is not full enough to be exhaustive, it should have been made so. An unsatisfactory code is worse than no code at all.

We are now in a position to cite some specimens of the workmanship of the Code. Let us pass over ss. 1—9, which are purely introductory, and commence with the first part of the first Division of the Code, which is entitled **OF PERSONS.**

“§ 10. A minor is a person under the age of twenty-one years.

“§ 11. All other persons are adults.

“§ 12. A child conceived, but not yet born, is to be deemed an



existing person, so far as may be necessary for its interests in the event of its subsequent birth.

“§ 13. Persons of unsound mind, within the meaning of this Code, are idiots, lunatics, imbeciles, and habitual drunkards.

“§ 14. The custody of minors and persons of unsound mind is regulated by Part III. of this Division.

“§ 15. A minor cannot give a delegation of power.

“§ 16. A minor may make a *conveyance or other contract* in the same manner as any other person, subject only to his power of disaffirmance under the provisions of this Title, and to the provisions of the Title on Marriage.”

We must protest, in the first place, against the use of the expression “*Conveyance, or other contract.*” A conveyance is not a contract. A man may contract to make a conveyance; he cannot contract to make a contract. The awkwardness is not removed by the subsequent definition of a contract (s. 744). “A contract is an agreement to do or not to do a certain thing.” How can a conveyance be said to be an agreement to do or not to do a certain thing? Such slipshod language would be objectionable in an ordinary Act of Parliament. In a code, which aspires to the rank of a scientific composition, it is still less excusable.\* Again, the above definition of a contract is, in itself, objectionable. It sins against Aldrich’s old rule, that a definition should be *clarior et notior definito*. What is the use of saying that a contract is an agreement, which is all that the definition really says? Every one who knows what an agreement means knows what a contract means.

In the above example the meaning at any rate is clear. But unfortunately this is by no means invariably the case. Thus s. 488 runs thus—“A transfer of real property passes all easements attached thereto, and creates, in

\* The same objectionable expression is repeated in s. 21. Compare s. 855, where a sale is defined as “a contract . . . by which one transfers to another an interest in property.”

favour thereof, an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent, as such property was obviously and permanently used by the person whose estate is transferred, *for the benefit thereof*, at the time when the transfer was agreed upon or completed." What is the meaning of the italicised words? Possibly the cases referred to in the note appended to the section might explain the meaning. But the question then arises, to what extent the notes may be regarded as constituting an authorised interpretation of the Code? And to this question, as already mentioned, we can find no answer.

Another ambiguity is to be found in s. 1171, which is contained in the chapter on Trusts, to be hereafter referred to.

"§ 1171. Every one who *voluntarily assumes a relation of personal confidence* with another is deemed a trustee within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information, which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

What is the meaning of the term "personal confidence?" Your butler assumes a relation of personal confidence towards you with regard to your plate. But we assume that it is not intended by this section to make him a trustee. Every agent, every partner, assumes a relation of personal confidence to others. But it can hardly be intended to declare every agent a trustee. The meaning of the term should have been explained or defined.

Again s. 640 runs thus:—

"Where a decedent leaves a husband, wife, or child, the following property is to be immediately delivered by the per-

sonal representative to such wife or husband *and* child or children, and is not to be deemed assets."

The property so to be delivered is then described. It includes furniture, clothing, household stores and provisions, ten sheep, two cows, four swine, &c. The Code then continues:—

"§ 641. The property mentioned in the last section is to remain in the possession of the husband or wife, if there is one, during the time such husband or wife resides with and provides for the child or children of the marriage. When any child ceases so to reside, he is entitled to receive an equal share *or the value thereof of such property,*" &c.

Here we may ask, how is the property to be delivered to the wife *and* the children, as required by s. 640, if it is to remain in the possession of the wife, as directed by s. 641? Again, we find no provision as to the effect of necessary wear and tear. What is the meaning of "such property or the value thereof" in s. 641? Does it mean so much of the clothes, furniture, sheep, cows, and swine as may be in existence at the time mentioned? Or will the child be entitled to claim an equal share of the value of the articles *at the time* when they were delivered to the mother? Again, what is the meaning of "equal share"? Does it mean equal with the other children, or will the surviving parent be entitled to claim a share in the articles themselves, in addition to her life interest in them? We find no provision in the Code for the determination of these questions.

Take again s. 1259:—

"An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others.

"3. When it is the usage of *the place* to delegate such powers."

The usage of what place? Of the place where the

agent resides, or the place where the principal resides? The place where the contract of agency is entered into, or the place where the acts in question are to be done? It would be difficult to say. It is possible that the cases referred to in the note to the section may indicate the meaning of the expression. But then again comes the question before alluded to—what is the effect of the notes? Are they part of the Code, or not? At any rate, the point should have been made clear on the face of the section, which might easily have been done by the addition of a few words.

Similar objections may be made to the proposed statutory form of a policy of life insurance (p. 660 of the Code.) It contains the following clause:—

“If the person whose life is insured commits suicide, or dies from an injury suffered in a duel in which he is in any way engaged, or *suffered in consequence of the violation of a penal law* . . . . this policy shall be void.”

We can conceive innumerable questions arising upon the construction of the italicised clause. It might even be contended that if the act *causing* death be a violation of a penal law, the policy is void, in which case a murdered man would lose his policy as well as his life by his misfortune. But supposing this to be too clear for argument, many doubtful points may yet arise. Suppose A shakes his fist in B's face (which is an assault), and B thereupon shoots him, will A lose his insurance? Or suppose the person insured is sent to prison for any offence, and while in prison meets with an injury, and dies, does the policy become void? If the man had not been sent to prison he would not have met with the injury. The injury is therefore in one sense a consequence of the violation of a penal law by the person insured. Clearly it cannot be intended that every consequence of a crime, however remote, shall, if it cause death, vitiate the policy. But the

Code gives us no help towards fixing the degree of remoteness at which the line is to be drawn. It may be difficult to draw an exact line in the matter, but we think something more might have been done than has been attempted by the Commissioners. The clause may possibly be intended merely as a substitute for the ordinary provision against death by suicide or at the hands of the law; but if so, it cannot be considered a happy emendation.

Again, we must take exception to the selection of legal maxims incorporated in the Code, and forming Part IV. of the last Division. What is the use of inserting in a Code such propositions as the following?—

“§ 1983. The law respects form less than substance.

“§ 1986. The law never requires impossibilities.

“§ 1991. The greater contains the less.”

We are familiar with the latter as a proposition of Euclid, but we never expected to see it in a Code of Civil Law.\*

It is an invidious task thus to raise objection after objection to a work of this description. The labour expended by the New York Commissioners must have been enormous. They received no remuneration whatever for their services. No one would desire to criticise the result of their labours unfavourably, if it could be avoided. But we are sure that the Commissioners themselves would be the last to deprecate a candid criticism. The question of codification in England has passed out of the domain of theory. The construction of a digest is actually in progress. No one can say how soon the immediate compilation of a Code may become a matter of public discussion. It is, therefore, desirable that the merits of existing Codes should

\* Compare also ss. 1978, 1985, 1992, 1996, 1997. Other examples of what appear to be imperfections in the Code are to be found in ss. 638, 654, 655, 656, 670, 983, 990, 1171, 1184, 1194.

be well understood. If the New York Code is a good one, the codification of the English law is already complete. If it is not a good one, it is important that the fact should be known.

However, we have said enough upon points of detail. Our last and most serious objection remains to be stated. But before doing so, let us cite a specimen of the more successful portions of the Code. Such an example may be taken as a set-off against the manifold instances of failure to which we have referred. The following are some of the best sections which we can find. They relate to contracts in restraint of trade.

“§ 833. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than as provided by the next two sections, is to that extent void.

“§ 834. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, so long as the buyer or any person deriving title to the goodwill from him carries on a like business there.

“§ 835. Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.”

We pass on to the last, and perhaps the most serious, objection which we have to urge against the Code. This relates to its exceedingly meagre and incomplete character. It is in fact the merest skeleton and outline of the law. Its proper title would have been, “A sketch of the principal provisions of the Civil Law.” After a careful examination, we have no hesitation in saying that the Code contains *less information* on any of the subjects comprised in it than is to be found in the *ordinary elementary treatises* upon those subjects, such, for instance, as Mr. Joshua Williams’ works on Real and



**Personal Property.** The last-named works are admirable in their place—far superior in point of workmanship to the Code; yet every lawyer knows, that if they were turned into Acts of Parliament, they would form very incomplete Codes: and would go a very little way towards reducing the bulk or intricacy of the existing law. The Code does, indeed, make certain alterations in the law. But setting these aside, no greater effect would be produced if the New York Code became law, than if, as in the case supposed, Mr. Williams' books were similarly treated: except indeed that, as the Code Commissioners have by no means done their work as well as Mr. Williams, the ambiguities and inaccuracies in the Code would probably produce results by no means intended by its authors. It must carefully be remembered that *the Code in no way affects to repeal or alter the existing law*, except so far as the two are inconsistent with each other. Now, in almost every case, the Code does no more than lay down the general rule of law, without touching that vast mass of explanations, exceptions, additions, and deductions, which the judicial industry of centuries has accumulated upon the original rule. And, as every lawyer knows, lawsuits turn, not upon the simple general rule, but upon some point in the vast growth of law engrafted upon it. It follows, therefore, that the Code (except in those few points in which it embodies original legislation) would produce hardly any effect upon the existing law. It would not simplify it. It would not consolidate it. It would save no labour to the practitioner, no expense to the suitor. It would not supersede a single text-book, or a single volume of reports; scarcely even a single Statute. It would, indeed, contain the general principles of the law, but it would not facilitate their application to particular cases. Of what use, then, would it be? Or, at least, of what use at all commensurate with the trouble and risk attending an important change in the law? Apparently, the Legislature of New York has thought as we do.

For, although the Code was completed and presented to the Legislature in February, 1865, it has not yet received the sanction of that body. It remains, therefore, a mere report, devoid of all force or authority.

In order to prove the truth of our assertion as to the meagreness of the Code, we propose to examine a single branch of law, as treated in it; and to ascertain what sins of omission are to be found therein. For this purpose we have selected the subject of Trusts. And we have the less hesitation in doing so, inasmuch as Mr. Sheldon Amos, in his pamphlet on Codification, already referred to, has singled out this, with other subdivisions of the Code, as especially worthy of commendation. The subject of trusts is mainly comprised in Title VIII. of the Fourth Part, of the Third Division of the Code (p. 347). It is also touched upon in Division II., Part II., Title IV., "Of Uses and Trusts." The latter title is, however, almost entirely confined to the subject of Uses, and contains little or nothing applicable to Trusts, strictly so called. The subject of Powers, and the position of trustees entrusted with powers, is also separately treated of (p. 92); and there is, of course, a separate title on Succession, including the duties of executors and administrators (see p. 183). There is also one section (s. 650) relating to trustees, which is not included in any of the above titles, and which seems to be somewhat out of its place. Nevertheless, after making all due deductions upon these scores, it may fairly be said that Title VIII., above referred to, contains, with very few exceptions, all that is to be found in the Code on the subject of trusts properly so called. What, then, is the size of Title VIII.? It contains forty-eight sections of a few lines each, to which are to be added the notes appended to the sections. Upon the ambiguous position of these (the notes) we have already observed. The title in question occupies fourteen pages, each containing very much less text than an ordinary page of the octavo edition of the Statutes. Contrast this with the bulk of Mr. Lewin's well-known

work on the same subject, which contains between 600 and 700 closely-printed pages! Of course a code may be expected to be much shorter than a text-book. Still, so enormous a discrepancy would, of itself, induce a lawyer to suspect the Code of incompleteness. How far such a suspicion would be correct will be seen by the result of the inquiry, which we are about to commence. We must again remind our readers that the existing law remains untouched and unrepealed, except so far as it is inconsistent with the Code.

We observe, then, to begin with, that there is not a word about Charitable Trusts in this or any other portion of the Code. Indeed, the *whole subject of charities is entirely omitted from the Code*. There is no definition of what are charitable purposes; no allusion to the equitable doctrine of *cy-près*; no regulations to insure the due administration of charitable trusts. The subject is only mentioned in one section (s. 391), which merely says that charitable corporations may be formed.

Again, *we can find nothing about the renewal of leases* in the Code. There is no mention — certainly no express mention — of the doctrine that a trustee cannot renew a lease for his own benefit. Nor is any statement to be found of the mode, in which the expenses of renewing a lease are to be apportioned between tenant for life and remainderman.\*

So, also, there is no mention whatever of the position of a tenant for life as a *quasi* trustee for the remaindermen. Nor, again, does the Code anywhere say whether trustees for sale may postpone the sale; or for how long; or whether they may employ conditions of sale; or may buy in the property at an auction; or whether they may make a lease before sale, or may mortgage instead of selling. Upon all these points, therefore, the existing law will re-

\* If s. 242 applies to the case, it merely states that the tenant for life must pay a "just proportion" of the amount,

main in force, untouched by the Code. Nor, again, does the Code anywhere state what *investments* are authorised in the case of trust money, nor say anything about the duty of a trustee to convert insecure investments. Nor does it contain anything about the power of a trustee to vary the investments of the trust property. Again, it is stated (s. 1212) that a trustee who is *unfit* to execute the trust may be removed; but there is no explanation of the word "unfit." It should have been stated whether or no a trustee, who is living abroad, or who becomes bankrupt, &c., is unfit within the meaning of the section.

Again, it is a rule of the English, and we presume of the American, law, that where a trustee wrongfully converts the trust property, the *cestui que trust* may, under certain limitations, follow the property which has been wrongfully substituted for the trust estate, and has a lien upon it. No hint of this is to be found in the Code. It will therefore remain a rule of law, altogether outside of the Code.

Again, s. 1188 runs thus:—

"A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which by his negligence he enabled the latter to commit; but for no others."

This is a good illustration of our previous assertion, that the Code seldom does more than lay down the bare general rule of law; and that such an enactment is of little or no use to the practitioner. Cases are of very frequent occurrence in which the question arises, how far an innocent trustee is personally liable for signing receipts, or doing other acts, for the sake of conformity as it is called. Such questions are of considerable intricacy; and there is a large amount of law to be found upon the point. Let our readers then consider, whether the solution of such questions would be materially assisted by the existence of such a statutory

enactment as the above section of the Code? \* Is it not obvious that a lawyer engaged upon such a question would at once fling the Code aside, and proceed in his investigations without further attention to it?

Let it not be supposed that these sins of omission are confined to the subject of Trusts. Thus, the entire subject of *equitable waste* (i.e. the cutting of ornamental timber by a tenant for life without impeachment of waste) is omitted from the Code. So also, in relation to the subject of specific performance (see s. 1893), nothing is said about those cases in which, *from the nature of the case*, the Court cannot decree specific performance, as where it has not the means of enforcing its decree. To take another example: it is laid down (s. 1897) that specific performance will not be granted of a contract to buy land, unless the vendor can make a title "free from reasonable doubt." But the Code nowhere explains the meaning of the expression, "free from reasonable doubt." It does not even mention that a sixty years' title will be sufficient. Another example of the meagre character of the Code is supplied by the subject of *Servitudes*. This branch of law, in common with two others, has been selected by the Digest Commission of this country, as the subject of a specimen digest, which digest is now in course of construction. The subject of *Servitudes* may therefore be regarded as one of no ordinary interest. Yet it occupies only four pages in the Code, the important head of *Lights* being scarcely adverted to. (See s. 245.)† So also two sections (ss. 2010, 2011), of a few

\* It is to be observed that no further provisions are to be found upon the point in the Code, beyond the few lines above cited.

† See, however, a communication from Mr. C. F. Stone, of New York, in defence of this subdivision of the Code, published *ante* vol. 26, p. 108. Our limits do not allow us to examine at length Mr. Stone's arguments. His communication is a reply to certain criticisms in the *Law Times*, and is mainly designed to show that a code may reasonably be expected to be much shorter than a text-book. He also points out that the transfer of servitudes, &c., is dealt with in another chapter of the Code, in common with the transfer of other

lines each, contain all which is to be found upon the subject of *constructive notice*.\*

But we have said enough. In conclusion we can only express our deliberate opinion as to the merits of the Code. It is this. The Civil Code of New York is in a high degree meagre, ambiguous, and inaccurate. It has not yet received the sanction of the Legislature. Should it ever do so, it may be useful to students as an elementary textbook. It may also be of service to laymen desiring to obtain some notion of the general principles of the law. To the practitioner it will, except so far as it effects alterations in the existing law, be absolutely useless. So far as it alters the existing law, it will, from its meagreness and imperfections, be productive of extensive litigation, and will require to be wrought into shape by a vast amount of judicial interpretation.

kinds of property; and that the same principle applies to other cases. No doubt this is so, but we must nevertheless submit that the law *peculiar* to servitudes cannot be adequately dealt with in four pages. And we think that any one who will be at the trouble of examining the pages in question (pp. 74-8) will agree with us. The question of lights had not been suggested to Mr. Stone. He therefore offers no explanation of the circumstance that the many points peculiar to the law of lights are not adverted to in the Code.

\* See also p. 150, where nothing is said as to the delivery of *part* of a thing, as the key of a chest, being sufficient to constitute a valid *donatio mortis causa*. The subject of stoppage *in transitu* is treated with peculiar inadequacy (p. 520). Many other instances might be mentioned.

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## ART. II.—THE LAW MILITARY AS DISTINCT FROM MARTIAL LAW.

*The Military Forces of the Crown; their Administration and Government.* By CHARLES M. CLODE. London: John Murray. 1870.

ON two previous occasions in this journal \* the subject of military law has been discussed, chiefly, however, in connection with the statutory provisions on the subject, as contained in the Mutiny Act and Articles of War, and the practical working and the proposed reform of the military tribunals, known as Courts Martial. Since then the attention of the public and the profession has been in a marked way drawn to this subject, mainly as arising out of the legal proceedings taken against Mr. Eyre for his conduct while Governor of Jamaica. We shall offer no apology to our readers for again recurring to this most important branch of law, upon which the work by Mr. Clode, which appears at the head of this article, throws considerable light. Some further investigation of the subject has become the more necessary, as the law binding on the armed forces of the Crown, and from which they derive their existence,—in what respects it differs from that state of things known popularly, but most erroneously, as “martial law,”—is, if possible, in a condition still more uncertain than before the recent discussion to which we have referred.

What is martial law? What is meant by the proclamation of martial law? How does such a state exist lawfully, and what are the effects of its existence? All these are questions which, as observed by a distinguished American lawyer,† are of great interest, and to which, however, it is not easy to find a satisfactory answer.

\* Vol. XIX., August, 1865, and Vol. XX., February, 1866.

† Attorney-General Cushing. *Opinions of Attorney-General*, vol. viii., p. 373.

There are not many *dicta* on the subject of military law, or the legal status of military persons, to be found in the judgments or writings of English lawyers. Foremost, however, in reputation, as in time, of the so-called definitions which have come down to us, is that of Sir Matthew Hale, who thus in his history of the law defines, or rather describes, the law martial—"Martial law," he says, "is not in truth and reality a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army is that only which gives these laws a countenance. *Quod enim necessitas cogit defendit.*"\* This proposition, however, seems to rest on a conception of the subject which is certainly incomplete if not erroneous, and is, at all events, not to be taken as a description of the law military as administered in Great Britain and her Colonies under the Mutiny Act and Articles of War. Lord Hale's observations should rather be confined to that abnormal and exceptional state of things which arises when a military force is employed in active service in the field, in quelling an insurrection, or in reducing to subjection a revolted colony. But this idea, imperfect as it was, appears to have been the accepted view of the matter in Westminster Hall, where the question remained, down to a comparatively recent time, without any more accurate appreciation.

The next attempt at defining the nature and limitations of the law military is to be found in the judgment of Lord Loughborough, in the great case of *Grant v. Sir Charles Gould*.† There a motion was made in the Court of Common Pleas on behalf of Sergeant Grant to obtain a prohibition of the sentence of a general court martial awarded against him; and in giving judgment, Lord Loughborough took occasion to remark, which was undoubtedly true, "That martial law, such as it is described by Hale, and such also as it is marked by Sir William Blackstone, does not exist

\* "History of the Common Law," p. 39.

† 2 Hen. Bl., p. 98.

in England at all;" and added, "that nothing was so dangerous to the civil establishment of the State, as a licentious and undisciplined army; and the object of the Mutiny Act, therefore, was to create a court invested with authority to try those who are part of the army, in all their different descriptions." He proceeded, however, to observe that "the essence of martial law consists in its being a jurisdiction over *all military persons whatsoever, in all circumstances,*" and because military men are liable for many offences, and have their personal rights regulated by the Common Law; "therefore," he said, "it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain."

From this passage it will be seen that, although Lord Loughborough proposed to himself to correct the inadequate conception of martial law as found in the writings of Blackstone and Sir M. Hale, and to place the subject on a more settled basis, yet he himself showed that he was nearly as far off as were those distinguished persons from approaching to an accurate comprehension of the difference between law martial and the law military. For, in fact, military law, as the expression is now perfectly well understood in England, is a branch of the Statute Law of the land; restricted indeed in its operation to a certain class of persons, applicable also to certain only of their acts, and administered by special tribunals; but neither in these nor in any other respects differing essentially as to foundation in constitutional reason from Admiralty, Ecclesiastical, or indeed in many of their features from Chancery or Common Law. And this fact his lordship himself seems to admit, when he goes on to observe that—

"This court, 'i.e. a Court Martial,' being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the Courts in Westminster Hall must depend upon the same rules with all other Courts which are constituted and have particular powers given to them, and whose acts, there-

ore, may become the subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority which the Courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction when they assume a power to act in matters not within their cognizance."

Again, to come later down, we find instances of similar inadequacy of definition in the accounts given of the doctrine by modern writers. In Mr. Serjeant Stephen's Commentaries, for example, there occurs the following passage:—

"Martial Law may be defined as the law, whatever it may be, which is imposed by the military power, and has now no place in the institutions of this country, unless the Articles of War established under the Acts just mentioned be considered as of that character."

This language is certainly open to the charge of want of precision, if not of positive inaccuracy, for the Mutiny Act and Articles of War so far from being a law, or rather code, imposed either mainly or exclusively by the military power, springs, in fact, from precisely the same source as every other legislative Act; and when martial law—a term which is rather descriptive of a certain state of society than a condition of legal subordination—is in force, it arises not under the Articles of War or any other similar enactment, but from the necessity of the case; nor, if we look to its origin and operation, is it confined to military persons or bodies, either as being the source from which its existence is derived, or as limiting and marking out the objects over which its authority is exerted.† Where tribunals are

\* Com. vol. II., p. 602, note.

† In the latest utterance on this subject some attempt is made at a more systematic division. "We have seen," says Mr. Broom, "that by various enactments, persons belonging to the army, navy, and royal

established under martial law, in the strict sense of the term, as, for instance, where a colony is in a state of disaffection or open revolt, it by no means follows, as in the case of the administration of the law military, that the persons composing the Courts should be military persons, or that those over whom the jurisdiction is exercised should be soldiers. In truth, under martial law, the difference between a soldier and a civilian disappears, as we have said, before that overpowering necessity which calls such a state of things into existence. "Created by necessity," as observed by Lord Brougham in a celebrated case, "necessity must limit its continuance."\* And for the same reason does the difference for the time vanish between the law military and the law civil or municipal. All these systems of jurisprudence and distinction between classes are proper to society in its normal state of tranquillity and obedience to the laws. In the case supposed, that of insurrection or open revolt, they merge and are absorbed in the simple condition of absolute subjection, for the time, of all persons and all causes, to one supreme authority; and this is the view which is supported by Sir James Mackintosh, whose opinion on a question of jurisprudence is of value, and is expressed in a passage of so much eloquence that we quote it *in extenso* :—

"The only principle," he says, "on which the law of England tolerates what is called Martial Law, is necessity; its introduction

marines are placed under a stricter discipline and more stringent regulations than other subjects of the Crown, and the military law which governs them is often, though incorrectly, spoken of as a martial law. This term, however, is sometimes used in another sense as indicating an abnegation of all law save the will of the commanding officer in war time. It is in reference to martial law taken in this sense, and supposed to be built on no settled principles, but entirely arbitrary in its decisions, that Sir M. Hale observed that "in truth and reality it is not a law, but something indulged rather than allowed as a law. . . . It would seem that, in spite of opinions to the contrary, martial law, thus understood, cannot exist in England (*Grant v. Gould*, 2 H. Bl.) If, however, its exercise here were ever lawful, necessity alone could justify it." See charge of Cockburn C.J. to Grand Jury in *Regina v. Nelson*, 1867, pp. 84-85. Broom's Commentaries, vol. I., p. 503.

\* Debates on Demerara Rebellion (1823). Hansard, Deb., vol. II., p. 968. Cited Mil. Adm., vol. II., p. 161.

can be justified only by necessity ; its continuance requires precisely the same justification of necessity ; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for Courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community. While the laws are silenced by the noise of arms the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer. Every moment beyond is usurpation ; as soon as the law can act, every other mode of punishing supposed crimes is in itself an enormous crime. But martial law, exercised against enemies or rebels, is only a more regular and convenient mode of exercising the right to kill in war ; a right originating in self-defence, and limited to those cases where such killing is necessary, as the means of ensuring that end. Martial law, put in force against rebels, can only be excused as a mode of more deliberately and more equitably selecting the persons from whom quarter ought to be withheld, in a case where all have forfeited their claims to it. It is nothing more than a sort of better regulated decimation, founded upon choice instead of chance, in order to provide for the safety of the conquerors, without the horrors of undistinguished slaughter. It is justifiable only where it is an act of mercy. Thus the matter stands by the law of nations.”\*

It is of the greatest importance that this subject should be examined in the light of correct ideas, not only because any confusion between the principles which lie at the root of the different systems of law of which we speak, forms an obstacle to any satisfactory treatment of the question, viewing it merely as one of jurisprudence, but also because of the direct conflict of opinion which has recently taken place in a case where the doctrine has been judicially investigated. And it is not one of the least valuable portions

\* Works, vol. III., p. 407. Cited Mil. Adm., vol. II., p. 161.



of Mr. Clode's book, or of the service which he has rendered to those who are desirous of examining the subject in its legal bearing, that he has for the first time collected in a systematic form a mass of authorities and opinions, both judicial and extra-judicial, illustrating the most prominent instances where the Crown, acting through the local governor, has been forced to adopt the extreme measure of proclaiming martial law; in other words, suspending the ordinary procedure of the civil tribunals, for the purpose of suppressing rebellion.\*

The points which we have just noticed go to form the first leading distinction between the law military and the law martial. The former is a code embodied in the Mutiny Act and Articles of War, of which the ordinary courts of justice take cognizance. As a rule, it takes effect during, and indeed its enactments are framed in view of, a time of peace, when its tribunals would exercise their functions independently of, and yet not antagonistic to, the civil courts with which they do not and cannot interfere. Military law also has relation to one class of the community only, that is to say, the standing army, and to one species of offences, namely, military. Intended for the preservation of order and discipline amongst soldiers, its provisions are clearly defined, and the conditions annexed to their violation distinctly laid down and fenced in, as those who are familiar with the procedure before courts martial are aware, with more than the usual restrictions. It may be regarded as, in fact, a *corpus juris*, framed not so much for a state of positive aggression, insurrection, or active hostilities, but designed for the better government of a body of men, the object of whose existence is, as defined by Parliament, the safety, defence, and preservation—terms almost in their nature exclusive of the idea of open warfare—of the United Kingdom and the possessions of the Crown.† Moreover,

\* Vol. II., p. 177. App. Note 2.

† Preamble to the Mutiny Act.

the enactments of this code of laws spring immediately from the source of all written law amongst us, namely, the act of the Legislature; and that too—such is the caution of Parliament in dealing with a force which might, unless guarded by salutary restraints, become dangerous to liberty—renewed every year. It is therefore a system eminently constitutional. It supersedes, it is true, with respect to one class, the action of the civil tribunals, but yet not to such an extent as to deprive those persons who, from the voluntary engagements into which they have entered, are amenable to its jurisdiction from access in certain cases by way of appeal to the Courts of Common Law. How far, indeed, this subordination in the last resort of Courts Military to the Courts of Common Law in matters relating to the discipline of the army, as affecting the liberty of the subject, is established cannot yet be said to be definitively settled, and a recent case,\* while it illustrates, has added to the uncertainty which surrounds the point; still, the fact itself, that the question of the appellate jurisdiction of the Common Law in proceedings almost entirely of a military character has been debated in the courts, and with a striking difference of opinion amongst judges of eminence, is a proof how remote is the law military, both in its origin and its operation, from that absolute authority and independence of ordinary civil control which we are accustomed to associate with the idea of the law martial. This latter state of things—which, as we have observed, is better described as an abnormal condition of society rather than one of subjection to any system of law—presents considerations wholly different from these, and opposed to them. In the first place, it exists during, and implies a state of war, or at least of insurrection against constituted authority, and also a suspension throughout the country which is the seat of war, of the ordinary

\* *Dawkins v. Lord F. Paulet*, Queen's Bench, Dec. 13, 1869. And see *Sutton v. Johnstone*, 1. T. Rep. 293. \* *Warden v. Bailey*, 4 Taunton. *Hawkins v. Lord Rokeby*, 4 Foster and Finlason.

methods of civil process. Further, martial law is not, like military law, confined to one class only of the community, but includes within its operation *all classes*, without distinction, who may be residing in the country. The courts also which dispense this rude species of justice are not necessarily composed of military persons, nor are the rules of evidence by which their proceedings are regulated reduced, as are those of courts martial, to any very systematic form; they are, as has been observed in a learned opinion, mere committees formed for the purpose of carrying into execution the discretionary power assumed by the Government. On the one hand, they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War. On the other hand, if they do so proceed, they are not protected by them as members of a real court martial might be, except in so far as such proceedings are evidence of good faith. They are justified in doing, with any forms and in any manner, whatever is necessary to suppress insurrection, and to restore peace and the authority of the law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War.\* And these are consequences which arise out of a state of facts. For the proclamation which, under circumstances of admitted necessity, calls martial law into existence is not to be considered as the legal creation of that law, but is merely a statement of facts, which of their own force have already rendered that law necessary. In a beleaguered city, for example, the state of siege, and the consequences incident to that state, exists because the city is beleaguered. Martial law, in short, involves in its own nature and of necessity the suspension of the ordinary securities for civil liberty, and their merging in the absolute risk of the individual who may be for the time being clothed with supreme military

\* Opinion on the Jamaica Inquiry, by Mr. Edward James and Mr. Fitzjames Stephen: cited Review, vol. XX., p. 339.

command. So much, indeed, is this the case, that in the United States, where the safeguards for the liberty of the subject are if anything more stringent and more jealously guarded than with us, martial law has been proclaimed for the sole purpose that it may bring with it the very result which by American lawyers has been held to be its natural and proper consequence, the placing of the laws in abeyance, and substituting in their place the arbitrary, and for the time irresponsible, will of a military superior.\*

It is not by this to be understood that the proceedings of the ordinary courts of justice must of necessity, in all cases whatsoever, cease in a country subject to martial law. They may exist and exercise their functions, but they do not do so as of right, or as deriving their jurisdiction for the time from the ordinary source which gives validity to their proceedings, but in subordination to military authority and to the will of the general or other officer in command, by whose permission it is exercised, and under whose direction they conduct judicial business and administer the law. This was the case, for instance, when the Duke of Wellington held military occupation of a foreign country; and it may be observed that the definition given of martial law by that distinguished authority is in the main identical with what has been already said. "Martial law," he declared, "was neither more nor less than the will of the general who commands the army."† An opinion which is quite in accordance with the views expressed by Sir D. Dundas, when Judge Advocate-General, on examination before a committee of the Commons in the year 1849, appointed to inquire into certain transactions which had taken place

\* See an able view of this question by Mr. Cushing; *Opinions of Attorney-General of the United States*, vol. VIII., p. 373.

† *Hansard Deb.*, 3rd Series, vol. CXV., p. 880. April 1, 1851. The law martial was, it may be observed, originally that jurisdiction exercised by the constable and martial over troops in actual service, and especially on foreign service. See Professor Montague Bernard's remarks on the Laws of War in the *Oxford Essay* for 1856.

at Ceylon, when the whole doctrine of martial law was examined at much length;\* and the opinion there expressed, defining martial law as the assumption for a certain time by the officers of the Crown of absolute power, exercised by military force, for the purpose of suppressing an insurrection or resisting an invasion, may be taken as a statement of the law which is substantially correct; while, on the other hand, the application of the term to the Common Law right of the Crown, or its representatives, or indeed of any body of persons acting in preservation of law and order, to repel force by force in case of attack, is inaccurate and improper.

Such, in brief, are the leading points in which the law military is contrasted with the law martial. We now proceed to the consideration of a third division of this subject, upon which, notwithstanding recent investigation, much uncertainty is found to exist. We refer to that condition of disturbance of the peace more or less deliberate, extending perhaps to insurrection or open revolt, where it is necessary, in order to suppress the outbreak, to employ the aid of the military power; but where at the same time such interference is marked by this most material incident as contrasted with martial law, namely, that after the insurrection has been put down and order restored, those persons who have been arrested as implicated in the outbreak are put on their trial, not according to the rude and summary process of a military tribunal summoned *ad hoc*, but by the ordinary court of justice and according to the usual forms of law. Such a state of things, it is evident, cannot with any propriety be termed one of martial law, using the term "law" in any defined sense which it bears in jurisprudence;† and yet there are writers who, in speaking of local disturbances and their suppression by

\* Cited LAW MAGAZINE, vol. XX., p. 336. Opinion of Mr. Edward James and Mr. Fitzjames Stephens.

† See Coke Littleton, Lib. iii., c. 6, s. 412.



military force, make use of the term martial law as being an appropriate description of this state of society; an employment of the word which seems rather to obscure than to illustrate the subject, inasmuch as the legal principles which lie at the root of those cases where the military are employed in aid of the civil power in suppressing rebellion form a wholly distinct class of questions, differing in kind and not only in degree from those which arise when the inquiry is, as to the constitutional legality of a system, established as one of government and administration of martial law. This system, as has already been remarked, has reference not only to the acts, whether of soldiers or civilians employed in carrying out the measures necessary in order to put down an insurrection, but to the legal machinery and the nature of the tribunal by which such acts are afterwards judicially examined and decided. It is one thing to quell an outbreak or a local disturbance of the peace, however formidable, by open force; it is quite another to compel those implicated to answer for their conduct before courts and judges, whose constitution and appointment are, except under very rare conditions, of questionable legality. If, therefore, the steps taken to restore order have been accompanied by acts of violence or loss of life—as was the case for example in the Gordon and Bristol riots, and in Ireland in the rebellion of 1798—and the subsequent inquiry into such proceedings, whether carried on at the suit of the Crown or of private persons, is conducted according to the ordinary course of criminal procedure, it cannot with any propriety be said that there was such a departure from the ordinary safeguards for the liberty of the subject as to justify the appellation of martial law. And equally would this term be misapplied—as it has been frequently misapplied—to a third state of which we have had in recent times and amongst ourselves a chief example, namely, where the ordinary safeguards, which the law has provided for the liberty of the subject, are in certain districts, and as against certain persons, for a time set aside by the suspension



of the Habeas Corpus Act; a condition of things which by some authorities has been spoken of as having something in common with martial law.

But though the relation is intimate, regarded as methods of dealing with rebellion, between the suspension of the Habeas Corpus Act and the proclamation of martial law, yet neither the mode of procedure nor its results are in these cases by any means the same. In the one case—that of the suspension of the Habeas Corpus Act—civil authority is as against certain suspected persons invested with additional powers, and the privileges of the subject for the time are in abeyance, but its place is not taken—at least in this country it has not been taken—by either the law military or the law martial. Those who have been deprived of their liberty in consequence of the Act being suspended may indeed be kept in confinement for an indefinite period, until tranquillity is restored and the ordinary legislative securities against arbitrary imprisonment are again in force; but if they are brought to trial it must be before the regularly constituted tribunals, and the inquiry must be conducted by the ordinary means and in due form of law.\* The suspension of the Habeas Corpus Act is also itself the result of a solemn and deliberative act of the Legislature, which alone can make such suspension legal and at the same time determine its duration. In the other case, that of the law martial, it is, as has been shown, of the essence of such a condition of things that military authority, and the dispensing of justice according to the rude and peremptory methods of military procedure, should reign supreme over every other form of jurisdiction.†

\* And this is the view taken by Hallam as to the distinctive feature of the law martial, namely, that it involves of necessity the suspension of civil judicature. *Const. Hist.*, vol. I., p. 240.

† In cases where the ordinary administration of justice has been arrested in any part of Great Britain recourse is had to Parliament, either to authorise in advance the suspension of the Habeas Corpus Act, or to indemnify ministers for the responsibility assumed in suspending it. Of Statutes may be cited the Act 57 Geo. III. c. 3, for the case of apprehended insurrection in the metropolis and in other parts of Great Britain, the indemnifying Act of 58 Geo. III. c. 6, the Act

The rebellion in Ireland in 1798, 1803, and 1833, together with the Jamaica case of 1865, are remarkable as illustrating the two opposite conditions under which this great constitutional question may present itself as opposed to a state of purely martial law on the one hand—as where an army is beyond the realm of England—and the condition of the suspension merely of the Habeas Corpus Act on the other. The former was the case not of a colony or settlement, but of an integral portion of the parent State, which was torn by disaffection and revolt. Between a country so situated and a colony, whether with or without representative institutions, marked distinctions exist, which appear, not so much in the measures taken for the repression of the outbreak, for in these the same features must of necessity occur, as in the mode in which those implicated are placed on their trial and punished. On the extension of the rebellion in Ireland and the failure of the first attempts at suppression, Orders in Council were issued to all general officers commanding His Majesty's forces to punish all persons actively aiding or in any manner assisting the rebellion *according to martial law*, either by death or otherwise, as to them should seem expedient for the suppression and punishment of all rebels. These orders were communicated to Parliament, and were assented to by both Houses of the Legislature, who conveyed their entire approbation of the

2 & 4 Geo. IV. c. 4, designed for the suppression of local disturbances in Ireland, and the recent Acts suspending the writ of Habeas Corpus in Ireland. These Statutes are sufficient to show that in Great Britain a state, not only of martial law, strictly speaking, with its incidents, but even where the ordinary course of justice is but locally and for a time interrupted, cannot exist without the exercise of the power of the supreme legislative authority (Steph. Com., vol. I., p. 147). But as to what circumstances will justify the proclamation of martial law in a colony or settlement remote from the seat of the central authority, and when there are no means of obtaining the previous sanction of either the imperial or local legislature or government to those measures which may be necessary for repressing disturbance and restoring tranquillity, is a question surrounded with difficulty, and involves conditions which, in the jurisprudence of this country, at least, have not received any very exact legal examination. See, however, *Phillips v. Eyre*, Ex. Chamber, Feb. 4, 1870.



House adopt the present motion I should follow it up with another, for leave to bring in a Bill to suspend, for a time to be limited, the Habeas Corpus Act in Ireland. This Bill is calculated to effect, if possible, by more lenient means, the suppression of those crimes which without this suspension must force the Government to the necessity of bringing to trial by court martial persons against whom suspicions of high treason are entertained; but by detaining such persons in custody, we prevent them from engaging in treasonable machinations; and persons so arrested may be tried in the ordinary process of the law without any military interference."

The remaining instance, that of 1833, is worth notice as being the last occasion in which courts martial were established for the trial of ordinary criminal offences in modern times. The Act then passed, 3 & 4 Will. IV. c. 4, which sanctioned this system for a limited period, contained the same provision or reservation as to the prerogative of the Crown that the two earlier Statutes contained; and from these enactments the inference may, we think, be fairly drawn not only, as Mr. Clode remarks,\* that the Crown was regarded by the Legislature as having an undoubted right of executing martial law for the defeat and dispersion of armed rebels, but (which is, as we have shown, of the essence of martial law) of following up such defeat by a suspension of the operation of the ordinary courts of justice, and placing the accused on their trial before military tribunals.

These transactions are full of instruction as a chapter in the history of constitutional law. In them can be traced the successive stages as applied to a condition of insurrection in a portion of the United Kingdom itself, of (1.) The direct influence of the Crown abridging the constitutional liberty of the subject; (2.) The permanent authority of the Common Law jurisdiction, even in the case of rebels, vindi-

\* 27 Howell's State Trials, vol. II., p. 174.

coated above Orders in Council, and allowing, as Mr. Curran put it in his defence of Wolfe Tone, "no court martial to take cognizance of any crime imputed to him while the Court of King's Bench sat in the capacity of the Great Criminal Court of the land;" and lastly, the interposition of Parliament required in advance to give by direct legislation *ad hoc* the sanction to suspend even for a time the ordinary securities of liberty of the subject. The case, on the other hand, of a colony, whether with or without representative institutions, presents considerations in many respects very different from these, which it is important should be borne in mind in examining the question as of constitutional law. The leading distinction is that noticed by Chief Justice Cockburn in his charge to the grand jury in the Jamaica case.

"A Crown colony is one which has been acquired by conquest, or what is considered as equivalent to conquest, by cession from some other State or power. A settled colony is a colony which is established where land has been taken possession of in the name of the Crown of England, and, being unoccupied, has afterwards been colonised and settled upon by British subjects."

Upon this distinction Mr. Clode observes:—

"With regard to such Crown colonies as are acquired by conquest—except so far as rights may have been secured by any terms of capitulation—the power of the sovereign is absolute. . . . Such possessions keep their own laws for the time; but subject to this they are under the absolute power of the sovereign of these realms to alter those laws in any way that to the sovereign in council may seem proper. . . . In a settled colony the inhabitants have all the rights of Englishmen. They take with them in the first place that which no Englishman can by expatriation put off, namely, allegiance to the Crown, the duty of obedience to the lawful commands of the sovereign, and obedience to the laws which Par-



liament may think proper to make with reference to such a colony. But, on the other hand, they take with them all the rights and liberties of British subjects—all the rights and liberties as against the prerogative of the Crown which they would enjoy in this country. . . . The importance of the distinction is obvious. In Crown colonies, as the power of the Crown is absolute, martial law may be declared at any time. In settled colonies, as the inhabitants are entitled as against the Crown to all the rights and liberties of British subjects, which they would enjoy here, martial law can only be declared under the conditions existing by the law of England, as altered or varied by local legislation.”\*

In the Jamaica case a question was made whether all settled colonies are entitled to the benefit of the Petition of Right. Upon this the Lord Chief Justice has observed, in speaking of the character and effect of the Statute, that—

“It is not an enacting Statute at all. It is not a Statute by which any new limitation was put upon the prerogative of the Crown, or by which the subject acquired any rights or immunities against the prerogative. It is a Statute declaring where, according to the law and constitution of this country, the prerogative of the Crown ends, and the rights and liberties of the subject begin. Therefore, if the Common Law of this country is, as I have already shown it to be, applicable to a settled colony, it follows that, if the Petition of Right would prevent the exercise of martial law by virtue of the prerogative in England, it must of necessity do so in Jamaica.”†

Besides the two cases to which we have referred, of an insurrection or outbreak in an integral portion of the United Kingdom itself, and in a colony, whether a Crown or settled colony, there remains a third case in which the effect of the law martial may be considered, that, namely, of an army

\* Vol. II., p. 175.

† See the argument of Lord Mansfield (when Solicitor-General) that the Crown has the absolute power to declare martial law in the colonies—15 Parl. Hist., p. 262. As to the power of the local governor, and how far he represents the Crown, see *Hill v. Bigge*, 3 Moore, P.C.O., p. 466.



beyond the realm of England. Here it would appear that if the Mutiny Act has not been made specially applicable,\* martial law, as it existed prior to the Petition of Right, prevails. In *Barwise v. Keppel*, the Court held that when the army is out of the national dominions, the Crown acts by virtue of its prerogative, and not under the Mutiny Act or Articles of War. *Flagrante bello* the Common Law has seldom interfered with the army, acting somewhat on the maxim, "*inter arma silent leges*," while within a period comparatively recent, as Mr. Clode points out, the extreme penalties of transgression have been enforced against soldiers without trial of any kind, and the correspondence between the Duke of Wellington and Lord Castlereagh shows the opinion which in 1806 was entertained of this exercise of power.†

These are the points to which, as being of chief value to our professional readers, we have more especially drawn attention in Mr. Clode's book. It only remains, in concluding our notice, to mention briefly certain other questions treated of in his volumes which, although they have for some time past been regarded as settled principles in constitutional law, may yet—there are not wanting indications which point to this result—be drawn into controversy. The relation, for example, of the Crown to the army on the one hand, and of the House of Commons on the other; and the position of the Treasury relative to other great departments of State as controlling public expenditure—upon these important points upon which public opinion is by no means settled, much light is cast by the documents drawn from official sources, of which a *resumé* is now, for the first time, given in a collected form. The employment of the military in aid of the civil power is fully treated of and illustrated by a valuable note, containing the opinion of the judges in the case of the *King v. Gillam*, at the Old Bailey, on the 10th July, 1768,

\* See 2 & 3 Anne, c. 20.

† Vol. II. p. 177, and Note II. Appendix. *Barwise v. Keppel*, 2 Wils. p. 314. *Bradley v. Arthur*, 4 B. & Cr., p. 306.

for the riot in St. George's Fields, in which report the views of the judges, as to the position of the military and other persons engaged in the preservation of the peace, present an exhaustive statement of the law on this subject; and in the appendix also (Vol. II., pp. 637, *et seq.*) will be found a paper containing the opinions of Lords Eldon and Redesdale on the same question. So again—a branch of the *lex scripta et non scripta*, composed partly of direct enactment, partly of usage and decisions of Judge Advocates-General—the Statute Law, as it may be termed, of the army in time of peace, which regulates the procedure of courts' martial, the offences over which these tribunals have jurisdiction, and the mode of taking of evidence, this important subject of inquiry is illustrated by opinions of former law officers of the Crown, now for the first time published, which will serve to show how carefully in former times the privileges of the subject were protected from the undue encroachment of military authority. These papers also cannot fail to be referred to with advantage as soon as attention is again called, as we trust it will soon be called, to the necessity of a rational reform in the existing system of administering justice by military courts, especially in those difficult cases—in the most recent of which there has been a difference of opinion in the Court of Queen's Bench\*—where alleged civil injuries of the nature of *torts*, such as false imprisonment, slander, libel, &c., are sustained by persons actually serving in the army, and who appeal for redress where the offence arises in connection with matters incident to their profession, to the Common Law Courts.† In connection with this subject may also be mentioned the question as to the liability of a large class of persons to be held subject, in the discharge of duties which, while closely connected with

\* *Dawkins v. Lord F. Paulet*. L.R. 5, Q.B. 94.

† See *Keightley v. Bell*; *Dawkins v. Lord Rokeby*; *Freer v. Marshall*. 4 Fes. & Fin. pp. 798—831. And see also on this subject *Wolton v. Gavin*, 16 Q.B., p. 61. *Clode, Mil. Adm.*, Vol. I., p. 150.

the army, are yet essentially of a civil character, to the provisions of the Mutiny Act and Articles of War, a matter which, in the large extension of our military administration, is one of importance and calls for more careful examination, chiefly in its legal aspect, than it has hitherto received. The office and functions of the Judge Advocate-General are noticed; his constitutional position with respect to the sovereign, the tribunal, and the prisoner, as also his responsibility to Parliament;\* upon these and kindred questions, much information and a considerable amount of learning is contained in Mr. Clode's volumes, and with this brief recapitulation of some of the leading questions of which he treats, we recommend to our readers' perusal a work which seems to supply a real want in the literature of constitutional law.

With us in England, it may be added in conclusion, and in the United States also,—whose legal system in this, as in so many other instances, corresponds nearly to our own—when the ordinary guarantees for civil liberty are once removed, everything is left to the mere will of the executive, or the person clothed with supreme military authority. There exist, however, it should be known, in some of the principal States of Europe, legal provisions by which the *état de siège*, or what corresponds to our martial law, is endeavoured to be regulated in advance by way of legislation. The *état de siège* in France is defined to be “a measure of public security, which temporarily suspends the Empire of the ordinary laws in one or

\* The Judge Advocate-General, it may be remarked, has nothing to do with martial law, and the proceedings of army courts held under martial law are not sent to his office. Sir D. Dundas, when Judge Advocate-General, thus explained this to the Ceylon Committee: “I have no more knowledge of the matter than the hon. member (Mr. Hume) has, or any other person who is competent to judge of a point of constitutional learning. Those things have nothing whatever to do with the office I hold. The whole proceedings of the office I belong to are proceedings under the Mutiny Act and Articles of War, and you are questioning me as to points with which I have nothing to do.”—*Mil. Adm.*, Vol. II., note, p. 360; and see Speech of Lord Brougham, *Demerara Case*, 11, H.L., p. 978.

more cities, in a province, in an entire country, and then considers them to be subject to the laws of war." Before 1789 no legislative provision had defined what should be understood by a state of siege, though it had often occurred. By the laws of the 10th July, 1791, and that of the 10th Metidor, year V., the cases of defence against foreign invasion and of internal insurrection had been provided for. Further provisions were made by the imperial decree of December 24th, 1811, and the law of 9th and 11th August, 1849, by which the whole subject is at present governed. And by the twelfth article of the Constitution of the 14th January, 1852, modified by the *Senatus Consultum* of the same year, it is declared that "the Emperor has a right to declare a state of seige (*état de siège*) in one or more departments, subject to a reference to the Senate with the least possible delay (*sauf à en référer au Sénat dans le plus brief délai.*) The consequences of a state of siege are regulated by law." In particular cases, indeed, the governors of colonies and commandants of military posts or places may declare a state of siege; but they are to render an immediate report, and if the central government does not think proper to raise the siege, a proposition must be made without delay to the legislature to maintain it.\*

The constitutions of Belgium and Italy, which are very express in their guarantees of individual liberty and private rights, expressly provide that the king has no other power than that which the constitution and the laws passed in accordance with the constitution give him; and the king is prohibited from suspending them or dispensing with their observance;† and under the laws of Italy this provision is so strictly adhered to, that in the war of 1859, when it was requisite for the very existence of Sardinia that the

\* Bouillet, *Dict. des Sienas*, p. 622, *Tripiet Code Politique*, p. 389.

† *Code Civil Belge*, ss. 7, 8, 10, 12, 78, 130. *Annuaire de Deux Mondes*, 1858-9, p. 197. See *Wheaton Inter. Law.* Ed. by Lawrence, note, p. 513.

executive government should be invested with extraordinary authority, Count Cavour asked from the chambers full powers for the king, including the right of suspending the liberty of the press and individual liberty; and in doing so he added that the institutions of the country would remain intact, and that the question was only with regard to a momentary suspension.

### ART. III.—THE DIARY OF A BARRISTER.

*Diary, Reminiscences, and Correspondence of Henry Crabb Robinson, Barrister-at-Law, F.S.A.* Selected and Edited by THOMAS SADLER, Ph.D. In Three Volumes. London: Macmillan & Co. 1869.

THE life of a successful advocate does not often afford much of general interest to those placed in a different sphere of action. It is too even and prosperous for romance or incident. Few care to know the amount of his yearly increasing fees, the number of causes in which he was engaged, and the offices he held, and the high station to which he attained by that steady and sure advance which took him onward from the beginning of his career. Where, however, there is something exceptional in the course of a barrister's life it will be often found that a record of his sayings and doings will prove very interesting as well as instructive. Few men in any station of life, not excepting even the highest, have so many opportunities as barristers of becoming acquainted with the world and its ways.

We believe that the case of the late Henry Crabb Robinson will be found to be one of these exceptional instances. His diary, reminiscences, and correspondence have recently been published under the editorship of his friend Dr. Sadler. The materials for the work consist of brief journals down to 1810, a home diary, forming no less than thirty-five volumes,



and about thirty volumes of journal of town reminiscences, papers, and letters. However, only about a twenty-fifth or thirtieth part of the whole of this collection, without reckoning the letters, has been selected by the editor for publication. Mr. Robinson made the acquaintance and moved in the society of most of the principal literary men and women of the age in which he lived, including those of France and Germany as well as of his own country. No doubt the most interesting part of Mr. Robinson's narrative is that which relates to those distinguished persons, but we must, though unwillingly, refrain from such portion of the work before us and confine our attention to the legal aspect which it presents. As, however, the object of biographical remains should be either to warn or guide others in their journey through the world, we shall sum up our review of the present work with some general observations on the nature of Mr. Robinson's career, and how far and to what extent we consider it worthy of imitation.

Henry Crabb Robinson came of a respectable though humble lineage. He was born May 13th, 1775, at Bury St. Edmunds. His childhood was uneventful. He was educated at private schools and at fourteen years of age the profession of an attorney was chosen for him without his knowledge, and he was articled to Mr. Francis, of Colchester. Here he became acquainted with the ordinary routine of an attorney's office, and read newspapers and pamphlets, including religious controversy.

At the Spring Assizes of 1791, when young Robinson had nearly attained his sixteenth year, he heard Erskine. The subject of the trial was the validity of a will, and the great forensic orator was specially retained for the plaintiff. There was a charm in his voice, and a fascination in his eye. His great artifice consisted in his frequent repetitions. He kept constantly dwelling on the leading arguments and main facts of the case, but varied his phraseology with such marvellous skill that no one was sensible of tautology in the



expressions. He addressed to the jury a pathetic exclamation—"If, gentlemen, you should by your verdict annihilate an instrument so solemnly framed I should retire a troubled man from this court," and then he beat his breast. Erskine, as may be expected, obtained the verdict in his favour, though not justly, for a new trial was granted and the will ultimately set aside.

While at Colchester, young Robinson made the acquaintance of Ben Strutt, a man of great ability, though self-educated. He was clerk to a provincial barrister, the recorder of the town, and having a great deal of leisure, he devoted his time to literature and art, besides acquiring some knowledge of law. He was an agent to country gentlemen, particularly in elections. This friendship had a practical bearing on the course of study of the young articled clerk. When he went to Colchester, having no one to direct him, he followed the usual routine. He procured a huge folio volume and copied therein his articles of clerkship, and commenced filling it with precedents. One evening, as he was writing industriously in this volume, Ben Strutt came in, and the following colloquy ensued:—

"'I'm sorry to see you so lazy, young gentleman!' 'Lazy! I think I'm very industrious.' 'You do. Well, now, whatever you think let me tell you that your writing in that book is sheer laziness. You are too lazy to work as you ought with your head, and so you set your fingers at work to give your head a holiday. You know it is your duty to do something, and try to become a lawyer, and just to ease your conscience you do that. Had you been really industrious, you would have studied the principles of law, and carried the precedents in your head. And then you might make precedents, not follow them.'"

The articled clerk therefore shut up the book and never wrote another line, and it remained in existence, a memorial of Strutt. The volume was found among his books by his executors after his death, and is stated to afford "evidence

of great industry, accuracy, and neatness, as well as order and method." It stops in the middle of a precedent. When writing on this subject in his old age, Mr. Robinson remarks that Mephistopheles might have given the same advice for it did harm and not good. Without indorsing this sentiment to its full extent, we have no hesitation in saying that the advice given to young Robinson was injudicious, and it would not be wise for others in his situation to adopt. No trained lawyer, we believe, would give such advice. The object of writing out precedents is not to learn the principles of law, but to obtain an acquaintance with the wording of forms, and thus to insure a more certain knowledge of their true meaning and signification. The very reverse of Ben Strutt's advice should be followed: the principles should be carried in the head and the precedents copied. The old lawyers recommended the practice of reading and copying pleadings, in order to understand accurately their nature and operation.

In December, 1794, an essay by Mr. Robinson on "Spies and Informers," was published in the *Cabinet*, got up by some young Liberals at Norwich. This was his first literary attempt, and, as he expressed it, delighted his vanity. In the same year took place the famous State trials of Hardy, Horne Tooke, and Thelwall. Mr. Robinson felt an intense interest in them, and during the first trial was in a state of agitation that rendered him unfit for business. He used to be at the post office early, and one morning at six o'clock obtained the London newspaper, with "Not Guilty" printed in letters an inch in length, recording the issue of Hardy's trial. He ran about the town knocking at people's doors and proclaiming the joyful intelligence. At midsummer, 1795, Mr. Robinson left Colchester, and remained at Bury till April in the next year. At this time he had serious thoughts of being called to the Bar, but was dissuaded from such a step by his acquaintances. He had, however, a disinclination to becoming an attorney, and con-

sequently the intention of pursuing either branch of the profession was for the time abandoned. He entered society and led, to use his own expression, "a busy, idle life." On April 20, 1796, Mr. Robinson went to London with the intention of entering an attorney's office, in order to qualify himself for practice. His days were spent in the courts with little profit. He heard Erskine frequently, and his admiration of him was confirmed, but he acquired no fresh impression about him. He tried to procure a suitable situation but without success, and returned to Bury in the summer. In October, 1796, he returned to his old London quarters, and entered the office of Mr. White, a solicitor, in Chancery Lane. His occupation there was almost entirely mechanical, and therefore of no great advantage. His leisure was devoted partly to legal and miscellaneous reading, from which he derived little benefit, and partly to attending debating societies, which afforded him practice in public speaking, and thus materially contributed to his moderate success in life.

In the year 1797, which Mr. Robinson designates the servile year, he obtained the situation of conveyancing clerk in the office of Mr. Hoper, Boyle Street, Saville Row, at a guinea a week. Here he remained three weeks, when he was recommended to a better place in the office of Mr. Joseph Hill, of Saville Row, with whom he remained till his uncle's death at the close of the year. Mr. Hill was the particular friend of Cowper the poet. He had no general law practice, but was steward to several noblemen. Mr. Robinson's occupation was to copy letters, make schedules of deeds, and keep accounts, but though his service was light, and the hours of attendance from half-past nine or ten till five, such as to give leisure for reading, the situation was not favourable for the acquirement of legal knowledge. On becoming clerk to Mr. Hill, Mr. Robinson removed from Drury Lane to small and neat rooms on the second floor at 20, Sherrard Street. At this period the forums

were a source of great enjoyment to Mr. Robinson. They served to exercise his mind, and whatever faculty of public speaking he afterwards possessed he attributed to them. As a general rule, the speakers were not men of culture or refinement. These institutions have now become either extinct, or have so far degenerated as regards company, that they are rarely frequented by students for the Bar.

The subjects discussed, however, at the two or three of these places which still remain, are either political topics or social questions of current importance. No subject of a harmful nature is discussed at them.

On January 1, 1798, Mr. Robinson received the news of the death of his uncle Robinson, through which event he came into about a hundred pounds a year. This acquisition of a comfortable independence led Mr. Robinson to resolve to quit Mr. Hill's employment, where he was idling away his time, and learning nothing. Accordingly in March of this year he left, and was dismissed by his employer with good advice, as to leading a life of business and avoiding habits of speculation. In the course of the year 1800, Mr. Robinson went to Germany, where he remained more than five years, and pursued something like study, and where he was brought into contact with some of the most distinguished men of that country. He stayed a few weeks at Marburg, the seat of an university, where delightful apartments had been taken for him in the house of Professor Tiedemann, the author of a learned History of Philosophy. Adjoining his own were the rooms of Professor Savigny, afterwards Minister of State for the Law Department in Prussia, or a kind of Chancellor, but better known in England through his writings on "History of Roman Law," and other works. At this time, Savigny was commencing his professional career. A dinner for four was brought up to his apartments every day, for him, the two Brentanos, and Mr. Robinson, and they usually spent the rest of the day together. Savigny is described as having a

fine face, strongly resembling the portraits of Raphael, and as to manner, rather solemn in his tone. He was paying his addresses to the eldest of the Miss Brentanos, Kuni-gunda by name, and several of her letters to him were sent under cover to Mr. Robinson. However, though sensible of the solidity of his attainments, and the worth of his private character, he did not foresee Savigny's great future eminence. Of his conversation, he only recollected the remark that an English lawyer might render great service to legal science by studying the Roman Law, and showing the obligations of English Law to it, which were more numerous than is generally supposed. This would, no doubt, be a beneficial work for an English writer to take up, though not very likely to be accomplished. The fact is, that the course of study pursued by the legal profession, is of too practical a nature to lead to a recondite search into the history of the laws they are called upon to administer.

One of Mr. Robinson's employments during part of 1802-3 was that of a contributor to the *Monthly Register*, edited by his friend Collier. The subjects on which he wrote were German literature, the Philosophy of Kant, and kindred topics. He also gave many translations from Goëthe, Schiller, and others, in order to exemplify the German theory of versification. He sent, what he terms, one really wise paper, a translation of an essay by Savigny on German Universities. In 1805, Mr. Robinson compiled a small volume on Cranio-logy, published by Longman, which, according to its modest author, excited hardly any public interest, though in an edition of "Rees's Cyclopædia," then coming out, the substance of the article there on that subject was copied from his work, and suitably acknowledged. In the latter part of the year 1805 Mr. Robinson returned to England. An incident occurring at this time shows the special value which he placed on a new literary acquaintance. At Hackney, he saw repeatedly Miss Wakefield, and one day at a party, when



Mrs. Barbauld had been the subject of conversation, and he had spoken of her in enthusiastic terms, Miss Wakefield came up to him and said—"Would you like to know Mrs. Barbauld?" He replied, "You might as well ask me whether I should like to know the angel Gabriel." The young lady's rejoinder was,—“Mrs. Barbauld is, however, much more accessible, I will introduce you to her nephew.” And through this source the acquaintance arose. In the year 1806, Mr. Robinson was engaged to translate a political work against Buonaparte, for which a bookseller, named Tipper, of Fenchurch Street, gave him a guinea and a half per sheet. A circumstance which occurred just now indicated the extreme sensitiveness of Mr. Robinson. He had made a successful speech at the old forum he formerly frequented; and in the ensuing week, on going there again there was general clapping on his walking up the centre of the room, at which he felt so annoyed that he turned back and never entered the place again.

In January, 1807, Mr. Robinson was appointed by Mr. Walter, editor of the *Times*, to be the correspondent of that journal at Altona. His articles were from “the banks of the Elbe.” He had to escape hurriedly from Altona in consequence of the war between England and Denmark. On returning home in the latter end of the same year he continued on the staff of the *Times* as a sort of foreign editor. During the spring of 1808, Mr. Robinson entered himself a member of the Middle Temple, and at the same time attended at the Surrey Institution for the purpose of acquiring practice in business speaking. In July of this year, he was appointed correspondent of the *Times* in Spain. He landed at Corunna, and was there when the battle of that name took place. In January, 1809, he returned to London and resumed his occupation at the *Times* office. On August 12, he received a letter from Mr. Walter informing him that he had no longer any need of his services, and on September 29 he formally laid down his office of foreign editor



of the *Times*. The good nature of Mr. Robinson was manifested in this transaction for, notwithstanding Mr. Walter's letter, which could scarcely be construed other than one of dismissal, he remained on terms of intimate friendship with him up to the time of his death. The same year Mr. Robinson became a contributor under his own name to the *London Review*, then first started, but, with his characteristic modesty, he thought less of Tipper the editor because he professed so much admiration of his single article, a review of the great pamphlet on the "Convention of Cintra," by Wordsworth, as to direct it to be placed first in the number.

In November, 1809, Mr. Robinson began keeping his terms at the Middle Temple Hall, though he had not then made up his mind to study the law seriously. On November 18, he ate his first dinner, having previously deposited 100*l.* with the treasurer. He states that he entered the beautiful hall with an oppressive sense of shame, and wished to hide himself, as if he were an intruder. He felt conscious, though we think without reason, of being too old to commence the study of the law with any probability of success. His feelings, however, were much relieved by seeing William Quayle in the hall, who very good-naturedly found a place for him at his mess. We are much surprised to read that this dining in hall was found so unpleasant by Mr. Robinson that, in keeping the twelve terms required, he doubted whether he took a single superfluous dinner. There is, no doubt, something special, and in a certain degree peculiar, about these dinners at the Inns of Court. You meet strangers, unless the forethought be exercised of making up a mess of friends. The society is necessarily that of men, and as regards many of the students they appear simply for the business purpose of keeping a term. Yet though it has some drawbacks the system of dining is a pleasant institution, and we have no doubt that had Mr. Robinson given it a fair trial he would have found full scope for the play of his intellectual and convivial qualities at the messes in the Middle Temple Hall.

In 1810, Mr. Robinson wrote a paper on Blake, for a German magazine. In the year 1811, he began to keep that diary, extracts from which form a large portion of the present work. This event was an epoch in his life. The journal henceforth during his long career received its almost daily entries. He judiciously remarks that "when looking at a diary there seems to be too little distinction between the insignificant and the important." Perhaps no one who thinks too much of what he is going to say will write an agreeable journal. On this account those diaries not designed for publication prove the most pleasant reading. In the latter part of this year, Mr. Robinson made up his mind to study for the Bar in earnest. This resolution was brought about, as is often the case with many of the serious changes in life, by a small circumstance: On March 1, Mr. Collier received an application from York to send down a reporter for the State trials there. He requested Mr. Robinson to go, but he declined on the ground of the objection taken to reporters being called to the Bar. Speaking of this circumstance to his sister, she said:—

"For a man who has the repute of having sense you act very like a fool. You decline reporting because that might be an obstacle to your being called to the Bar, and yet you take no steps towards being called to the Bar. Now do one or the other. Either take to newspaper employment, or study the law at once and lose no more time."

This sisterly remonstrance proved effectual. In writing to his brother Thomas, on March 14, 1811, he says:—

"I have at length (after hesitating only from twelve to thirteen years) made up my mind to abandon all my hobby-horsical, and vain, idle, and empty literary pursuits, and devote myself to the law."

In the spring of 1811, and just before he was induced seriously to prepare for being called to the Bar, Mr. Robinson translated a fairy tale by Anton Wall called "*Amatonda*,"

which was published by Longman, and he believed fell dead from the press. The work was never reviewed, and only praised by friends, among whom was Coleridge. But the failure of this attempt led Mr. Robinson to resolve to abandon all idea of embarking on a literary career, and induced him to turn his attention seriously to law. On January 20, 1812, Serjeant Rough introduced him to Mr. Littledale, afterwards Judge of the Queen's Bench, whose pupil he became by presenting him with the fee of a hundred guineas, and by entering at once on his employment. Mr. Littledale's chambers were at Gray's Inn. On February 26, 1812, Mr. Robinson met at a dinner party, Godwin and Serjeant Rough, who themselves met on such occasion for the first time. An incident arose out of this dinner which reads very much like a practical joke, though, if true, it presents a strange state of impecuniosity.

"The very next day Godwin called on me to say how much he liked Rough, adding—'By-the-by, do you think he would lend me 50*l.* just now, as I am in want of a little money?' He had not left me an hour before Rough came with a like question. He wanted a bill discounted, and asked whether I thought Godwin would do it for him? The habit of both was so well known that some persons were afraid to invite them lest it should lead to an application for a loan from some friend who chanced to be present."

On March 15, 1812, there is the record of a conversation with Hamond, when he told an anecdote of Jeremy Bentham. Some years before he called on the great jurist without an introduction, merely to obtain his acquaintance. Bentham at first declined to receive him, but on seeing Hamond's card, altered his mind and an interview took place. Bentham confessed that he himself when a young man was so enthusiastic an admirer of Helvetius that he actually thought of offering himself as a servant to him. "You," he said to Hamond, "took a better way." On June 17, at four o'clock, Mr. Robinson dined in the Middle

Temple Hall with De Quincey, who was very civil and cordially invited him to visit his cottage in Cumberland. On October 10, he again dined at the Hall, and found a chatty party. This last date reads strange, as now that period occurs in the long vacation, and there are no dinners in any of the halls at that time. On February 23, 1813, Mr. Robinson underwent a sort of examination from Mr. Hollist, the Treasurer of the Middle Temple, who inquired at what University he had been educated, to which he replied that he was a dissenter, and had studied at Jena. This form being complied with, he was ready to be called the next term. The same day a Mr. Talfourd called on Mr. Robinson, with a letter of introduction. He is described as "a very promising young man indeed, and has great powers of conversation and public speaking; not without the faults of his age, but with so much apparent vigour of mind that I am greatly mistaken if he do not become a distinguished man." The prediction was verified, for this then unknown young man afterwards became the author of "Ion" and Judge Talfourd.

On May 8, in the evening Mr. Robinson went to the Temple, where he learned that he had been called to the Bar, and the assurance of the fact, though he had no reason to doubt it, gave him pleasure. In a memorandum written in 1847, he states that since his retirement he had frequently asserted that the two wisest acts of his life were going to the Bar when, according to the usual age at which men begin practice, he was already an old man, being thirty-eight, and retiring from the Bar when, according to the same ordinary usage, he was still a young man, namely, fifty-three. The wisdom, however, of such a course is not very apparent. In a letter to his brother Thomas, of May 9, 1813, he thus describes the ceremony of his call:—

"At four o'clock precisely I entered the Middle Temple Hall in *pontificalibus*, where the oaths of allegiance and abjuration, were administered to me. I then dined, dressed as I was, at a table

apart. I had five friends with me. After dinner we ascended the elevation at the end of the hall. My friends and acquaintances gradually joined our party. We were just a score in number. I believe you are acquainted with none of them, but the Colliers, Amyot, Andrews, and Quayle. The rest were professional men. After drinking about six bottles of humble port, claret was brought in, and we broke up at ten. What we had been doing in the meanwhile I shall be better able to tell when I have received the butler's bill. I cannot say that it was a day of much enjoyment to me. I am told, and indeed I felt, that I was quite nervous when I took the oaths. And I had moments of very serious reflection even while the bottle was circulating, and I was affecting the boon companion."

The same day his friend Wedd Nash left for him the copy of an Inclosure Act, of which he had been nominated auditor at a fee of ten guineas. This first professional emolument was very opportune, and served to raise his spirits. On July 6, 1813, Mr. Robinson went to a supper party at Rough's, given in honour of the new Serjeant Copley. This was the first step in the career of Lord Lyndhurst. On July 11, he called on Madame de Staël. In Germany he assisted her as a student of philosophy, and he now rendered her service as a lawyer. Murray the publisher was with her, and Mr. Robinson assisted in drawing up the agreement for her forthcoming work on Germany, for which she was to receive 1500 guineas. On July 14, he went into the country to attend sessions and circuit, and thereupon quitted the house and family of the Colliers, in which he had lived for years as an inmate with great pleasure. On July 18, he partook of his first dinner with the Bar mess, at the Angel Inn at Bury, when he took his seat as junior on the sessions circuit. At Norwich, August 20, he defended a man for the murder of his wife and her sister by poison. The prisoner was acquitted. This fortunate accident brought Mr. Robinson forward so that his fees at two assize towns amounted to nearly 50*l*. He alludes to this amount as small, yet, at the present day, it would be a considerable sum for a junior to make on his first circuit. Indeed,



many men go the circuit for years without realising anything like so much. Mr. Robinson's immediate senior on the circuit was Henry Cooper. He was, in some respects, an extraordinary man. His memory and cleverness were striking, but he wanted judgment, and would sometimes sacrifice his client to a clever hit. One day, while he was entertaining the whole court in such way, Rolfe, afterwards Lord Chancellor Cranworth, whispered to Robinson, "How clever that is! How I thank God I am not so clever!"

On November 1, 1813, after a short visit to Anthony Robinson, his namesake, Mr. Robinson came to chambers, and slept for the first time in his own bed. He felt a little uncomfortable at the reflection of his solitude, but some satisfaction at the thought that he was independent and at home. He had not yet collected around him all that even he deemed comforts, but he anticipated that he should find his wants very few, except those arising from the desire to appear respectable, not to say wealthy, in the eyes of the world. During his fifteen years at the Bar, Mr. Robinson relieved himself from the dulness of a London professional life by annual excursions, of all of which he kept journals. In the autumn of 1814, he took one of these excursions to Paris, and several times attended the Courts of Justice there, and came to the conclusion that if he were guilty he should wish to be tried in England, if innocent in France. He was much struck with the freedom accorded to the prisoners. One of them exclaimed, "You lie!" The president very quietly and even courteously said, "In what does the lie consist?" Another thing he remarked was that the prisoner does not stand as in the English courts, but has a little box to himself with a desk and papers. The box is so placed that he can communicate with his counsel.

It may not be generally known that Erskine was ever an author. In the course of a call on Amyot on January 28, 1815, Mr. Robinson was informed that Lord Erskine was writing a life of Charles James Fox. It was considered



that this work would determine the doubtful fact whether he had any literary talent. The great jury-orator since his retreat from the Chancellorship had been devoting himself merely to amusement, and the only way to prevent the waste of a mind so active as his was to devote himself to authorship. It does not appear, however, that Erskine proceeded far in his literary pursuits, though in 1825 Fox's collected speeches were published in six volumes, with a short biographical and critical introduction by Erskine. On January 26 Mr. Robinson dined with Mr., afterwards Baron, Gurney.

"He appeared to advantage surrounded by his family. The conversation consisted chiefly of legal anecdote. Of Graham it was related that in one case which respected some parish rights, and in which the parish of A B was frequently adverted to, he said in his charge, 'Gentlemen, there is one circumstance very remarkable in this case, that both the plaintiff's and defendant's counsel have talked a great deal about one A B, and that neither of them has thought proper to call him as a witness.'"

About this time Mr. Robinson heard from Jekyll the following pun about Erskine, which reads scarcely credible. He said—

"Erskine used to hesitate very much, and could not speak well after dinner. I dined with him once, at the Fishmongers' Company. He made such sad work of speechifying that I asked him whether it was in honour of the Company that he *floundered* so."

It would seem from this anecdote that speaking at the Bar, when thoroughly acquired, does not necessarily render a man ready of speech on other occasions. It is one thing to speak from facts, and statements, and arguments, and another to make an impromptu speech from nothing at a wedding-breakfast, a dinner, or festive gathering of any kind.

On December 7, Mr. Robinson spent several hours at the Clerkenwell Sessions, and heard a case of settlement come

before the court, which exemplified in an extraordinary manner the peculiar minuteness of this branch of the law.

“Was the pauper settled in parish A or B? The house he occupied was in both parishes, and models both of the house and the bed in which the pauper slept were laid before the court, that it might ascertain how much of his body lay in each parish. The court held the pauper to be settled where his head (being the nobler part) lay, though one of his legs at least, and great part of his body, lay out of that parish.”

On December 31, the close of the year 1815, Mr. Robinson records that it had been like most of the years of his life, a year of uninterrupted health and prosperity, besides being so successful in his profession, that he had a prospect of affluence if the same good fortune attended him. He did not now fear poverty. The Editor of these volumes, Dr. Sadler, observes with a note of exclamation, that these remarks were occasioned by the rise in Mr. Robinson's fees from 219*l.* in 1814, to 321*l.* 15*s.*, in the next year. But the increase to a barrister would appear very satisfactory, and quite to warrant the sanguine remarks recorded.

While on circuit at Bedford, March 10, Mr. Robinson—

“Was a little scandalised by the observation of the clerk of a prosecutor's solicitor in a case in which I was engaged for the prosecution, that there was little evidence against one of the defendants, that in fact he had not been very active in the riots, but he was a sarcastic fellow, and they wished to punish him by putting him to the expense of a defence, without any expectation of convicting him.”

At Bury, July 23 and 24, Mr. Robinson defended several sets of rioters, of whom some were acquitted, and on August 3, at Bedford, he records “an agreeable day, being relieved from the burthensome society of the circuit.” In the course of a vacation tour in 1816, in Cumberland, he came upon an

auction, at a place called Ravenglass, which is peculiar to that county.

"The auction of some pieces of land did not begin till we had taken tea. This is the custom in this county. Punch is sent about while the bidding is going on, and it is usual for a man to go from one room to another and report the bidding which is made in the rooms where the auctioneer is not."

At the summer circuit of 1816, Rolfe made his appearance. Mr. Robinson thereupon wrote in his diary, "our new junior, Mr. Rolfe, made his appearance. His manners are genteel, his conversation easy and sensible. He is a very acceptable companion, but I fear a dangerous rival." And his brother asking him who the new man was, he said, "I will venture to predict that you will live to see that young man attain a higher rank than any one you ever saw upon the circuit." This prediction was verified by Rolfe becoming Lord Chancellor. Mr. Robinson was advised to attend the Old Bailey Sessions, and accordingly he did so several times this year, but without producing a fee. He was once invited by the sheriffs to dine with the Lord Mayor and the judges. During the year 1816 his fees had risen from 32*l.* 15*s.*, to 355*l.* 19*s.*

On circuit at Aylesbury, March 11, 1817—

"We dined with Baron Graham, and the dinner was more agreeable than any I ever had with any judge. The baron was very courteous and chatty. He seemed to enjoy talking about old times when he attended the circuit as counsel. It was, he said, forty years this spring since he first attended the circuit. 'At that time,' he said, 'there were three old serjeants, Foster, Whitaker, and Sayer.' They did business very ill, so that Leblanc and I soon got into business almost on our first coming.' Whitaker, in particular, he spoke of as a man who knew nothing of law, merely loved his joke. Foster did know law but could not speak. He spoke of Leblanc in terms of great praise. He had the most business-like mind of any man he ever knew."

At Bedford, Friday 14, 1817, there was a *Qui tam* action by a rector against the squire of the parish to recover 20*l.* a month for not going to church. There was an answer on the merits, so there was a verdict for the defendant, otherwise it seems the penalty could have been recovered by virtue of an ancient and forgotten Statute.

On June 18, Mr. Robinson spent the evening in writing what he modestly terms a dull review of Coleridge's second lay sermon for the *Critical Review*.

The proceedings in the celebrated case of *Ashford v. Thornton* being the last instance of a wager of battle in a trial for murder have been often narrated by different writers; but, nevertheless, the account given of it by Robinson, who was actually present, may prove interesting. It may be remarked that the term "Appeal of Murder" had no reference to former proceedings, but was a criminal prosecution at the suit of the next of kin to the person killed apart from any prosecution of the Crown, and might take place after an acquittal. The scene occurred on November 17, 1817, before Lord Ellenborough in the Court of King's Bench, in Westminster Hall. Thornton was brought up for trial on an appeal after acquittal for murder. No one seemed to have any doubt of the guilt of the prisoner, and his escape was attributed to the unfitness of a real property lawyer to manage a criminal trial. For this reason the public sense was not offended by recourse being had to an obsolete proceeding.

"The court was crowded to excess. Lord Ellenborough asked Reader whether he had anything to move, and he having moved that Thornton should be permitted to plead, he was brought to the Bar. The declaration or count being read to him, he said 'Not Guilty. And this I am ready to defend with my body.' At the same time he threw a large glove or gauntlet on to the floor of the court. Though we all expected this plea, yet we all felt astonishment at beholding before our eyes a scene acted which we had read of as one of the disgraceful institutions of our half-civilised ancestors.

No one smiled. The judges looked embarrassed. Clarke, on this, began a very weak speech. He was surprised, 'at this time of day, at so obsolete a proceeding,' as if the appeal itself were not as much so. He pointed out the person of Ashford, the appellant, and thought the court would not award battle between men of such disproportionate strength. But being asked whether he had any authority for such a position, he had no better reply than that it was shocking because the defendant had murdered the sister that he should then murder the brother. For which Lord Ellenborough justly reproved him, by observing that what the law sanctioned could not be murder. Time was, however, given him to counter-plead, and Reader judiciously said in a single sentence, that he had taken on himself to advise the wager of battle on account of the prejudice against Thornton, by which a fair trial was rendered impossible."

The appellant in the following term set out all the evidence in replication, it being the old law that, when that leaves no doubt, the wager may be declined. Hence a long series of pleadings, during which Thornton remained in prison. Judgment was postponed and an Act of Parliament passed to abolish both the wage of battle and the appeal. In the result Thornton was acquitted.

On November 25, 1817, Mr. Robinson held a brief for one Williams, at Portsca, who had sold in his shop two of the famous parodies, one of the Litany in which the three estates, King, Lords, and Commons, were addressed with some spirit and point on the sufferings of the nation, and the other of the Creed of St. Athanasius, in which the Lord Chancellor, Lord Castlereagh, and Lord Sidmouth were with vulgar buffoonery addressed as Old Bags, Derry-Down, Triangle, and the Doctor and the triple ministerial character spoken of in the well-known form of words. The Attorney-General applied for judgment, and Mr. Robinson spoke in mitigation. The court sentenced the defendant for the Litany to eight months' imprisonment in Winchester gaol and a fine of 100*l.*, and for the creed to four months' imprisonment. On

December 18, 1817, Mr. Robinson spent the greater part of the morning at the King's Bench sittings, Guildhall, where Hone's first trial took place. It was for publishing a parody on the Church Catechism, attacking the Government. The trial was not over till late in the evening, when he was acquitted. Hone was again tried and acquitted on December 19, and on December 20 he was tried for the third time and acquitted. On this occasion Hone said, attacking the Bar, that "there was not a man who dared to contradict Lord Ellenborough for fear of losing the ear of the court." Mr. Robinson refers to this remark as "a most indecent because a most true assertion." This trial is supposed by some to have shortened Lord Ellenborough's life. In a letter written by Mr. Robinson to his brother Thomas in the month of December, 1817, he says, "that a man of an heroic nature should be reduced to very silence like an imbecile child is indeed a sad spectacle." As a fact, Lord Ellenborough resigned his office as Lord Chief-Justice on account of ill-health in the month of October, 1818, and died on December 13 in the same year.

In the year 1817, Mr. Robinson's fees increased from 355*l.* 19*s.* to 415*l.* 5*s.* 6*d.*, though he refers to this addition as too paltry to be worth notice. On March 19, 1818, he had six Crown briefs at Thetford. One of them was flattering to him, though it was an unwelcome one to hold, being on behalf of Johnson for the murder of Mr. Baker, of Wells. Mr. Robinson received a letter from Dekker, the chaplain to the Norwich Gaol, to the effect that he had recommended him for the present case because of his "admirable and successful defence of Massey for the murder of his wife." On April 24, Mr. Robinson had the unusual pleasure of hearing one of the very best forensic speeches ever delivered by Sir Samuel Romilly. It was in support of an application that the Countess of Antrim should abstain from influencing her daughter, Lady Frances Vane Tempest, in favour of Lord Stewart, who had applied for



a reference to the Master to fix the marriage settlements, which Romilly resisted. "His speech was eloquent, without vehemence or seeming passion, and of Ulyssean subtlety."

During the autumn of 1818, Mr. Robinson re-visited Germany. He was introduced to the Grand Duke of Weimar, and dined at his court. "He talked freely and bluntly. He expressed his disapprobation of the English system of jurisprudence, which allowed lawyers to travel for months at a time. 'We do not admit that.'" The Brentano's circle had become extended by the presence of Savigny and his wife.

In the year 1818, Mr. Robinson became "a barrister of five years' standing." His fees increased from 415*l.* in 1817 to 488*l.* during this year. This practice brought him into connection with superior men and into superior courts. He

filed an appeal in the Privy Council from Gibraltar, with Sir Samuel Romilly, in a case of mercantile guarantee. It was Sir Samuel's practice not even to read the brief before he came into court, but to state from it the simple facts and then trust to the information acquired from his junior and adversaries for the reply. In this case he replied in a masterly manner, and his argument was luminous and powerful. At the Spring Assizes, at Thetford, Mr. Robinson was retained by an attorney—a stranger—to defend a *qui tam* action for penalties for money to the amount of 2640*l.*, and gained a verdict. The speech he made established him as a speaker, and acquired for him greater credit than any he ever made before or after. Even the man he had exposed gave him something to do afterwards on his own account, and more than once attorneys—new clients—in bringing him a brief alluded to this case. In the spring term of this year, Gurney (afterwards Baron Gurney) the King's Counsel's clerk, brought Mr. Robinson a bag, for which he presented him with a guinea. This custom is now obsolete.

"It was formerly the etiquette of the Bar that none but serjeants and king's counsel could carry a bag in Westminster Hall. Till some king's counsel presents him with one, however large the junior (that is stuff-gowned) barrister's business might be, he was forced to carry his papers in his hand. It was considered that he who carried a bag was a rising man."

The custom afterwards was that a junior might carry a blue bag, but not one of a red colour, unless presented by a king's counsel, and now the custom is altogether abrogated.

Before the Summer Assizes of 1818, Mr. Robinson dined with Chief-Justice Gibbs, and others of the circuit. His conversation was not very agreeable, being didactic and like that of a tutor with his pupils. He spoke against the "Term Reports," as ruinous to the profession in the publication of hasty decisions. What would the learned judge say had he lived to see the present "Weeklies"! The Chief-Justice remarked, on Erskine's sudden fall in legal reputation, "Had he been well grounded he could not have fallen." He did not think that Erskine ever made more than seven thousand guineas, and Mingay (a learned leader of his day, we presume, though his name has now passed into utter oblivion), confessed that he only once made five thousand guineas. He observed that the great fortunes made in ancient times by lawyers must have been realised indirectly as the stewards of great men. Otherwise they are unaccountable. But Mr. Robinson observes that all this is little compared with the enormous gains of his old fellow-circuiter, Charles Austin, who is reported to have made forty thousand guineas by pleading before Parliament in one session.

In the year 1818 there were several judicial changes in the law courts. Of these promotions Jekyll, who was the professional wag, said "that they came by titles very differently, namely, Chief-Justice Abbott by descent, Justice Best by intrusion and Richardson by the operation of law." On his arrival at Norwich the evening of August 10, Mr. Robinson

was even alarmed at the quantity of business awaiting him there, which exceeded anything he ever had before. He held during these assizes seventeen briefs, of which thirteen were in causes, that is, not criminal cases. The produce was seventy-five guineas, including retainers, exclusive of an arbitration fee. This amount raised his fees on the circuit to 134 guineas, a sum exceeding by twenty-nine guineas the utmost he ever before received. On the 13th September, Mr. Robinson rode to London. An old man on the box pointed out to him a spot near a bridge on the road where about forty years before the stage was turned over and seven people drowned, and that when he was a boy the road beyond Hounslow was literally lined with gibbets on which were in view ~~the~~ <sup>the</sup> carcasses of malefactors blackening in the sun. On October 12, 1819, Carlisle was tried for blasphemy for republishing Paine's "Age of Reason." He is described as "a pale-faced, flat-nosed man, not unlike Schelling, but having no intellectual resemblance, though he showed astonishing power of voice." He spoke for three days and was convicted on the 14th. On the 10th of November, 1819, Mr. Robinson went early to Serjeant Frere's chambers, 3, King's Bench Walk, and agreed for a fourteen years' lease of them, from the next midsummer, at seventy-five guineas per annum. They consisted of one tolerably-sized room, a second, which, by pulling down a partition, might be enlarged, and a clerk's room and three fireplaces. The chambers were good and light and looked into a garden, and the staircase was handsome. On December 15th, Mr. Robinson called on Mr. Walter, who informed him of what he never knew before, that the *Times* was once prosecuted for a libel of his writing, but the matter was dropped. Mr. Walter did not inform him of the circumstance at the time, thinking that probably the intelligence would pain him.

At Christmas, 1819, Mr. Robinson settled in his new chambers, from the windows of which, and within his room, there was a far more pleasing scene than he had

in his former apartments. Under date December 28, he writes:—

“The satisfaction I have in changing my residence is accompanied by the serious reflection that I cannot reasonably expect so much enjoyment and such uninterrupted ease as I enjoyed in Essex Court. During my six years’ residence there, I have not once been kept awake at night by pain of mind or body, nor have I ever sat down to a meal without an appetite. My income is now much larger than it was when I entered these chambers, and my health is apparently as firm. I have lost no one source of felicity.”

What a brilliant retrospect !

On March 7, 1820, Mr. Robinson dined with Judge Graham, who was of the same standing at college as Mr. Justice Buller, one of the most eminent judges of the last generation. Baron Graham said, “that though Buller was a great lawyer, he was ignorant on every other subject but law. He actually believed in the obsolete theory that our earth is the centre of the universe.”

The evening of February 10, 1821, was devoted to Talfourd’s call to the Bar, and also to that of Phillips, the celebrated Old Bailey orator, who defended Courvoisier for the murder of Lord William Russell, and afterwards became Commissioner of the Insolvent Court. The usual scene of merriment and speech-making took place on this occasion. In March, 1821, Mr. Robinson seems to have communicated to his friend Wordsworth his intention of retiring from practice at the Bar. The advice given by the poet is very wise, and might with advantage be considered by all who contemplate a similar step.

“Your determination to withdraw from your profession in sufficient time for an autumnal harvest of leisure, is of a piece with the rest of your consistent resolves and practices. Full surely you will do well, but take time; it would be ungrateful to quit in haste a profession which has used you so civilly.”

In the autumn of 1821, Mr. Robinson made a tour in Scotland. He paid a visit to the Earl of Buchan to whom he had a letter of introduction. He was the eldest brother of Lord Erskine.

"He was proud of his brother, the great English orator, but lamented his acceptance of the Chancellorship. 'I wrote him a letter,' said the Earl, 'offering if he would decline the office to settle my estate on his eldest son. Unluckily he did not receive my letter until it was too late, or he might have accepted my offer; his mind was so confused when he announced the fact of the appointment, that he signed his letter "Buchan."'"

Mr. Robinson's practice for the year 1821 fell off in amount, the fees being 572½ guineas as against 663 in 1820. On June 1, 1822, he was retained in a case in the House of Lords. The solicitor called and took him down to Westminster in a boat, a circumstance significant of the change in locomotion which has since taken place. Only fancy a barrister of the present day going from the Temple to Westminster in a rowing-boat! On his voyage down the Thames, on August 10, 1822, *en route* for a vacation tour in the South of France, the most remarkable object which presented itself to Mr. Robinson's notice, was "a group of gibbets with the fragments of skeletons hanging on them." For the year 1822 his fees amounted to 629 guineas, and for the year 1823 to 445 guineas. On May 28, 1824, he went down to Westminster to hear Serjeant Wilde in a libel case in defence of the British Press, and predicted his future success, which was verified by his becoming Lord Truro and Lord Chancellor.

In the year 1824, Mr. Robinson wrote an article in the *Quarterly Review* on French politics. During that year his fees rose from 445 to 469½ guineas. At the assizes at Norwich, this year, he was the instrument of necessitating a reform in the law of evidence on the trial of criminals, which was carried into effect in the next session of Parliament, by

a short Act of Parliament, introduced by Sir Robert Peel. This year, 1824, Mr. Robinson's fees rose from 469½ guineas to 677½. This increase, however, he attributed to the death of Henry Cooper, in the summer; but though a vacancy was thus occasioned, Mr. Robinson declared modestly that it was one he was unable to fill. In Norfolk, however, he started as a leader for the first time, holding briefs in sixteen out of seventeen cases, in nine of which he was either senior or alone. At the Aylesbury Assizes there was a trial which exhibited the aristocratic character of our nation. An Eton boy was indicted for murder for killing another boy in a boxing-match. Lord Nugent stood in the dock by the side of the boy, for which he was rebuked by Mr. Robinson. The youthful prisoner was acquitted, and the judge dismissed him without a word of reproof. On February 3, 1826, in the Common Pleas, Mr. Robinson saw a meeting of knights girt with swords to elect the Grand Assize. This was an antiquated proceeding which has now fallen into disuse.

In the long vacation of 1826, Mr. Robinson made an Irish tour. At Cork he visited the courts, "two wretched buildings in the shape of meeting-houses, the jury sitting aloft in the gallery, and the counsel on one side, sitting so near the gallery that they were obliged to lift up their heads ludicrously to catch a glimpse of the foreman." He went into the Nisi Prius Court. "The prominent man at the Bar was a thick-set, broad-faced, good-humoured, middle-aged person, who spoke with the air of one conscious of superiority. It was Daniel O'Connell." He formed his acquaintance in court, and the great agitator proved very civil. He took Mr. Robinson by the arm and led him from court to court, as he had business in most cases, and yet found time to chat with him at intervals all the day. With the judges, as well as the Bar and the people, O'Connell was a sort of pet. Mr. Robinson found that business was transacted with more gravity and politeness than he had



expected, and on questions of evidence greater latitude was allowed than in our English courts, that is, there was more common sense with fewer technicalities. He had a ride with O'Connell on the Killarney mail. "The glorious counsellor," as he was hailed by natives along the road, proved a capital companion with high animal spirits, good temper, earnestness in discourse, with intelligence on all the subjects discussed. It was known on the road that "the glorious counsellor" was to be on the coach, and consequently at every village and wherever they changed horses, there was a knot of people assembled to cheer him. At the little town of Macroom, Mr. Robinson alighted—

"And was shown the interior of a gentleman's seat (Hedges Eyre, Esq.), a violent orangeman I was told. However, in spite of the squire, there was in the town a sign-board, on which was the very 'counsellor' himself, with a visage as fierce as the Saracen's head. He would not confess to having sat for the picture, and promised us one still finer on the road. At one of the posting-houses, there was with the crowd a very old woman with grey eyes. As soon as we stopped she exclaimed with a piercing voice, 'Oh, that I should live to see your noble honour again! Do give me something your honour to—' 'Why, you are an old cheat!' cried the counsellor. 'Did you not ask me for a sixpence last time to buy a nail for your coffin?' 'I believe I did, your honour, and I thought it.' 'Well then, there's a shilling for you, but only on condition that you are dead before I come this way again.' She caught the shilling and gave a scream of joy that quite startled me. She set up a caper and cried out, 'I'll buy a new cloak, I'll buy a new cloak!' 'You foolish old woman, nobody will give you a shilling if you have a new cloak on.' 'Oh! but I won't wear it here, I won't wear it here.' And when the horses started, we left her still capering, and the collected mob shouting the praises of 'the glorious counsellor.' Everywhere he seemed to be the object of warm attachment on the part of the people. And even from Protestants I heard a very high character of him as a private gentleman."

The anecdote of the old woman well illustrates the ingenuity displayed by the Irish in begging. It also reminds us of an incident which occurred to a friend of ours on a visit to Killarney. One day he gave a pretty little girl, barefooted and ragged, sixpence. The very next day the same young mendicant begged again, when our friend said, "Why, did I not give you sixpence only yesterday?" "Ah! sure enough, your honour. But where is the snow which was last winter on Mangerton mountain?" The appeal of course was irresistible.

On their arrival at Killarney, O'Connell said to Mr. Robinson, "You are aware by this time that I am king of this part of Ireland," and invited him to his residence at Derrynane. On the 14th of August, accordingly Mr. Robinson went from Killarney, on an outside car, to Mr. McSwiny, O'Connell's brother-in-law, at Cahir. Here he found O'Connell. It was a fast-day, though liberal fare. There was great hilarity in his ordinary manners. At a dance the next evening at Mr. Primrose's, another connection, O'Connell was very lively, the soul of the party. On August 16th, Mr. Robinson made quite a royal progress with the liberator and his party to Derrynane, he arbitrating in matters relating to his tenants on the way. Mr. Robinson was well entertained, and returned to Killarney on August 19th.

In the year 1826 Mr. Robinson began to entertain thoughts of leaving the Bar. He records, under date of December 20, a long chat with Serjeant Storks, and a walk with him, when he encouraged such inclination. On January 31, Mr. Robinson thus writes to his old friend Goëthe—"Twenty-four years have elapsed since I exchanged the study of German literature for the pursuits of an active life, and a busy but uncongenial profession—the law."

On May 13, 1828, Mr. Robinson was present at an execution, and as such a scene in England has now become historical, it may be interesting to preserve the graphic

account of such a proceeding given by an intelligent eye-witness.

"There were to be five men executed, and I was desirous to witness for once the ceremony within the prison. At half-past seven I met the under-sheriff Foss at the gate. At eight we were joined by Sheriff Wilde, when some six or eight of us walked in procession through long narrow passages to a long, naked, and wretched apartment, to which were successively brought the five unhappy creatures who were to suffer. The first, a youth, came in pale and trembling. He fainted as his arms were pinioned. He whispered some inaudible words to a clergyman who came and sat by him on a bench, while the others were prepared for the sacrifice. His name was Brown. The second, a fine young man, exclaimed, on entering the room, that he was a murdered man, being picked out, while two others were suffered to escape. Both these were, I believe, burglars. Two other men were ill-looking fellows. They were silent, and seemingly prepared. One man distinguished himself from the rest—an elderly man, very fat, and with the look of a substantial tradesman. He said, in a tone of indignation, to the fellow who pinioned him, 'I am not the first whom you have murdered. I am hanged because I had a bad character.' A clergyman tried to persuade him to be quiet, and he said he was resigned. He was hanged as a receiver of stolen horses, and had been a notorious receiver for many years. The procession was then continued through other passages to a small room adjoining the drop, to which the culprits were successively taken and tied up. I could not see perfectly what took place, but I observed that most of the men ran up the steps and addressed the mob. The second burglar cried out, 'Here's another murdered man, my lads!' and there was a cry of 'Murder' from the crowd. I was within sight of the drop and observed it fall, but the sheriffs instantly left the scaffold, and we returned to the Lord Mayor's parlour, where the under-sheriff, the ordinary, two clergymen, and two attendants in military dress, and I breakfasted. The breakfast was short and sad, and the conversation about the scene we had just witnessed. All agreed it was one of the most disgusting of the executions they had seen, from the want of feeling manifested

by most of the sufferers, but sympathy was checked by the appearance of four out of five of the men. However, I shall not see such a sight again."

In the year 1828, at the end of the Summer Circuit, Mr. Robinson quitted the Bar. His object, he says:—

"In being called to the Bar was to acquire a gentlemanly independence, such at least as would enable a bachelor of no luxurious or expensive habits to enjoy good society with leisure. And having about 200*l.* per annum, with the prospect of something more, I was not afraid to make known to my friends that, while I deemed it becoming in me to continue in the profession till I was fifty years of age, and until I had a net income of 500*l.* per annum, I had made up my mind not to continue longer, unless there were other inducements than those of mere money-making."

In 1835 Mr. Robinson's friends began to suggest to him, "How uncomfortable you must be living alone in chambers!" and these remarks, together with his own feelings on the subject, led him to give up his chambers at 2, Plowden Buildings, Temple.

In the autumn of 1838 Mr. Robinson brought out a book on the Clarkson and Wilberforce controversy, in defence of the former. In a letter of the 10th August, 1838, addressed to Wordsworth, he says:—

"I think it a piece of capital luck when those whose opinion I most value never chance to hear of my writing. And I feel quite delighted that I shall be out of the way when the book comes out. It is remarkable how very different I feel as to talk and writing. No one talks with more ease and confidence than I do; no one writes with more difficulty and distrust."

On September 25, 1839, Mr. Robinson left his chambers in Plowden Buildings, and went to reside in apartments in Russell Square, No. 30, for which he was to pay 100*l.* per annum. In 1844 he bore a part in the passing of the

Dissenters' Chapel Act, 7 & 8 Vict. c. 45. This was to him the most interesting event of his life.

On May 7, 1858, at a dinner at Mr. Justice Byles's, Baron Martin related that he had heard Mr. Robinson mentioned by Baron Alderson as a singular instance of a man retiring from the Bar in full possession of the lead.

From the month of October, 1864, until his death, Mr. Robinson lived with his intimate friends, Mr. and Mrs. Talfourd Ely, in the house in which he formerly had rooms, he being the tenant. This arrangement was brought about by the advice of his friends, who considered that in the decline of life he should have a home. On June 23, 1866, Dean Stanley delivered the prizes at University College. Lord Brougham was present. On his coming into the theatre, Mr. Robinson rose to help him to a chair, "the tottering steps of the one supported by the other hardly less feeble, the one eighty-seven years old, the other, ninety-one.

Mr. Robinson continued his diary until January 31, 1867, when, after some remarks on an essay he had been reading, come the affecting words, "But I feel incapable to go on." This was the last entry. On Saturday, February 2, his illness assumed an alarming character. Dr. Sieveking attended him, but could do nothing. The strength of the patient gave way. He was able to talk cheerfully and affectionately to friends so late as the morning of the 5th, the day on which he died. Then came the cloud of insensibility in which he passed out of this world. He was buried at Highgate Cemetery, many relatives and friends being present.

The inscription on the tomb is:—

"Beneath this stone lies interred the body of Henry Crabb Robinson. Born May 15, 1775; died Feb. 5, 1867. Friend and associate of Goëthe and Wordsworth, Wieland and Coleridge, Flaxman and Blake, Clarkson and Charles Lamb. He honoured

and loved the great and noble in their thoughts and characters. His warmth of heart and genial sympathy embraced all whom he could serve, all in whom he found response to his own healthy tastes, and generous sentiments. His religion corresponded to his life, seated in the heart, it found expression in the truest Christian benevolence."

It remains for us to make a few observations on the character and career of Henry Crabb Robinson. He was a great reader all his life, though his studies of books were never directed to any particular object. He loved reading for its own sake, for the instruction it afforded, and the delight it brought. Indeed he was a voracious devourer of books. He read sitting, riding, walking, and in bed. During his waking hours and while not engaged in conversation, a book was scarcely ever out of his hand. But Mr. Robinson's great forte was conversation. In this art he was unrivalled among his friends and acquaintances. With the tongue he bore undisputed sway; though the persons he met were poets, historians, philosophers, and men of science, and women who held the first literary rank, he never felt unequal to the task or rather pleasure of conversation with them.

Mr. Robinson held literature and its professors in the highest possible estimation. In fact, too much so, perhaps, for his own individuality of character, as it probably led to that singular habit of self-depreciation which pursued him through life. Compared with those among whom he lived and moved—the literary giants of his age—his own life seemed humble and obscure, and full of shadow and nothingness. Yet in contrast with the lives and careers of the majority of men, that of Mr. Robinson was one of activity and usefulness. His own description of himself as that of "a busy, idle man" was not applicable.

When we contemplate the career of such a man as Mr. Robinson, there is one reflection which occurs forcibly and prominently to the mind: that it is a doubtful advantage to enjoy much of intimate friendship with distinguished literary



men. Their achievements seem to have overpowered Mr. Robinson's own aspirations, and led him unduly to depreciate his own intellectual powers. No one can tell the nature or extent of his literary faculties unless he has tried to exert them in different directions. Mr. Robinson's knowledge of the German language would have enabled him to become a good translator had he so persevered. His connection with the *Times* afforded an opportunity of becoming an effective writer for the press. His success at the Bar would have satisfied many an aspirant for forensic honours. But all his efforts were overshadowed by the superior talents and splendid successes of his distinguished friends. Far be it from us to undervalue the literary position or attainments of poets or novelists. The world owes much to them for amusement in vacant hours and intellectual recreation in the intervals of business, and for the means of assuaging sorrow and lightening affliction. But still there is not only room in the world of literature for more humble workers, but their services are actually required in order to advance the progress of mankind. Indeed, poems and novels, though they bring the highest fame, may be altogether dispensed with, but the world cannot get on without grammars, and dictionaries, law books, and works of science and utility. We should be glad to see such authors rank higher and obtain more substantial rewards than they do at present.

The present biography is worthy of perusal if only as a pleasing picture of a noble life. There is nothing to be hidden or concealed. It is full of good acts from beginning to end. Mr. Robinson was ever willing to assist the poor and deserving author, and it is stated that many literary persons now occupying high positions and possessed of wealth, in their days of poverty and obscurity received aid from him. Mr. Robinson was never married, and therefore the duties of husband or father did not devolve upon him; but in all the other relations of life he proved himself most exemplary. The letters to his eldest brother, continued

from youth to old age, would alone be worthy of publication for the beautiful spirit of fraternal love and amity which pervades them, carrying out in real life that which we, generally, can only dwell upon in theory. At the latest period of a life, also extended far beyond the limit allotted to man by the Psalmist, Mr. Robinson's powers of mind and vigour of constitution remained unimpaired. He was to be seen any time, until within a few weeks of his death, at the Russell Institution, situate near his residence, reading the last number of a magazine with all the freshness of early youth. When he died the lines addressed by Walter Savage Landor to the sister of Charles Lamb were truly also applicable to him:—

“He leaves behind him, freed from grief and years,  
Far worthier things than tears :  
The love of friends, without a single foe;  
Unequalled lot below !”

However, though there is much to admire in the life and character of Henry Crabb Robinson, there is little which can be imitated with advantage. His career was unique. He loved literature for its own sake. He wrote enough to know the difficulties of writing and to enable him to appreciate those who excelled in the art. To this circumstance, probably, he owed much of the success he obtained in his friendships with literary men of genius. He attempted no rivalry with them, and yet he was not subservient. Even very eminent authors generally prefer for companions those who are not, however distantly, engaged in running the same race for distinction. Johnson had his admiring Boswell; and Scott returned from grand London parties to revel in the society of Will. Laidlaw. Without also throwing any doubt on the sincerity of his friendships, unquestionably Mr. Robinson from being a bachelor was more welcome in families than he otherwise would have been. It certainly enabled him more freely to accept invitations, and to make excursions and

country visits among his friends. No episode of love shadowed his path, and he seems never to have regretted his life of celibacy. Still, though few can hope to find in such a career much to follow by way of example, yet all may read with pleasure and instruction these biographical memoirs.

#### ART. IV.—FRIENDLY SOCIETIES.

**F**RRIENDLY Societies (under a variety of forms) existed in England many centuries before the Legislature gave them the special embodiment with which the present generation is familiar. It is difficult to elicit, however, from the numerous Statutes on the subject, any precise definition of what a Friendly Society is. The distinctive features of these associations are providence and mutuality; the object of the union is to provide against future events, that either must or may happen to every member, and the method of so doing is by a mutual contribution from each, no profit being expected for or preference secured to any.

Within the limits of these two principal characteristics, societies of various descriptions are found to exist. In some, the contributions of the members to the mutual fund are largely assisted by donations from employers and other wealthy persons, who require no share in the benefits of the association, and are usually styled honorary members. The relation of these persons to the general body is matter of agreement, determined by the rules of the society; ordinarily, they are allowed, in consideration of their benefactions, to take a share in the management, and where this is done without breach of good feeling on either side, the arrangement may be found to be of advantage to both, and the pecuniary assistance may be the least valuable of the services rendered.

In another large class of societies, now daily increasing,

both in number and importance, though the element of patronage is not wholly excluded, its influence is much weaker, and the advantages derived from it are supplied by an elaborate system of organization. There are the societies known as the great affiliated orders; whose central representative bodies are instruments for collecting and diffusing much valuable information for the practical guidance of the several branches. The power to transfer a member from branch to branch in any part of the country, the provisions for unity of action, and the periodical changes in the governing body, are also great advantages.

Of a third class of societies, it is not possible to speak with equal favour. These retain the form of mutuality, but being constituted of large numbers of persons assured for small sums, whose premiums are collected by local agents in all parts of the country, a free representation of the members is not to be secured, and the strings of management are pulled by a small clique of officials in a central town, who may work the society for their own benefit rather than that of the members. This description applies too truly to many of the societies known as Burial Societies, established in the great towns and cities of the kingdom.

Other varieties of Friendly Societies might be enumerated, but the number belonging to each is scarcely sufficient to render it necessary, for our present object, to consider their peculiarities. The history of past legislation on this question, if our space would permit of our tracing it, would point to some useful conclusions in respect to the proper limits of State intervention in Friendly Societies, now a much vexed question.

The first Act "for the encouragement and relief of Friendly Societies" was that of 1793 (33 Geo. III. c. 54). By this Act the rules of proposed societies were subjected to the review of the Justices in Quarter Sessions. In 1795 (35 Geo. III. c. 111) and 1809 (49 Geo. III. c. 125) this Act was somewhat amended and extended; but in 1819 a new system was

introduced, avowedly for the prevention of fraud (59 Geo. III. c. 128), and it was required that the calculations of all societies should be approved by two persons, known to be professional actuaries or persons skilled in calculation. In 1829 (10 Geo. IV. c. 56) the present system of a certificate by a barrister was introduced, and instead of any sanction by actuaries, it was provided that the justices were to satisfy themselves that the tables proposed to be used might be adopted with safety. In 1834 (4 & 5 Wm. IV. c. 40) this latter provision was repealed; and in 1846 (9 & 10 Vict. c. 27) the confirmation of rules by justices was entirely done away with, and the present system of registration established. In 1850 (13 & 14 Vict. c. 115) another attempt to make societies sound by Act of Parliament was made, by their separation into two classes: those "certified," and those merely "registered." The certified were such as should obtain from an actuary a cumbrous document, provided by the schedule to the Act; and few indeed took the trouble to do so.

The present law of Friendly Societies is based on the Statute of 1855 (18 & 19 Vict. c. 63). Under this Act, the duty of the Registrar is to ascertain whether the rules are calculated to carry into effect the intentions and objects of the persons desiring to form the society, and are in conformity with law and with the provisions of this Act.\* The requirements of the Act with respect to the rules are that they should contain†—

- (1.) The name of the society and place of meeting for its business.
- (2.) Its objects and purposes, the conditions of benefit, and fines to be imposed.
- (3.) The manner of making, altering, and rescinding rules.

\* 18 & 19 Vict. c. 63, s. 26.

† *Id.*, s. 25.

- (4.) Provision for a committee, trustees, treasurer and other officers.
- (5.) Provisions for investment and audit.
- (6.) The manner in which disputes are to be settled.
- (7.) Provision that separate benefits are to be taken from separate funds.
- (8.) Provision for a separate contribution to defray expenses of management.

For the perusal, certifying, and registering the rules, no fee is now required. In like manner, without fee, the Registrar receives and records appointments of trustees (s. 17), and changes in the place of meeting for business (s. 28), and transfers, also without fee, stock in the Bank of England into the name of new trustees (s. 36). The annual report of the society, and also the quinquennial return of sickness and mortality, are to be sent to him, and he is to make an annual report of his proceedings (s. 45). Beyond this, the Act gives him no control over the internal affairs of any society. It gives the societies power themselves to determine how disputes shall be settled (s. 40), a summary remedy in cases of fraud (s. 24), free powers of investment (ss. 32 to 35), exemption from stamp duty (s. 37), authority to pay sums not exceeding 50*l.* upon death without administration (s. 31), a preference on the estates of bankrupt and deceased officers (s. 23), power to hold buildings and one acre of land for the purposes of their meetings (s. 16), power to unite (s. 14), and to dissolve by mutual agreement (s. 13).

The privileges of settling disputes and a summary remedy against fraudulent officers are given to societies even without registration, on the mere deposit of their rules (s. 41); and these, by an Act of 1869, have been extended to Trades' Unions.\* A more extended application of the same privileges is given to "provident, benevolent, and charitable institutions for relieving the physical wants and necessities

\* 32 & 33 Vict. c. 61.



of persons in poor circumstances, or for improving the dwellings of the labouring classes, or for granting pensions, or for providing habitations for the members or other persons elected by them.”\*

This Statute proceeds upon an intelligible and excellent principle, and was not passed without mature deliberation by a Parliamentary committee. Unfortunately, as is too often the case under our system of legislation, it has since been subjected to the process called “amendment,” in order to supply fancied defects in it, and the amending Acts have broken through the principle of freedom from official control, which is the distinguishing feature of the Act of 1855. These Acts are two. The first, passed in 1858,† gave power to the Registrar or to an actuary to declare a society insolvent, and to divide its funds;‡ but this met with so much disapproval on the part of the Friendly Societies that a second Act had to be passed in 1860,§ repealing the provision by which an actuary might determine the question of insolvency, and leaving it to the “investigation” of the Registrar. Nor is this all; by another section of the Act of 1860,|| power is given to the Registrar to take proceedings against any officer of a society for misapplication of its funds. These sections give to the Registrar that which the Act of 1855 studiously and properly withheld from him, viz., the appearance of an authority over the affairs and proceedings of a society after it has once obtained legal constitution. It is the false notion to which such provisions as these have given rise that has led to the blind faith said to have been placed in the Registrar’s certificate as a kind of talisman against insolvency. It is needless to point out that the Registrar, as a barrister, can have no official knowledge of what constitutes an insolvent condition, and can still less undertake to watch over the proper application of the funds of twenty thousand societies.

\* 18 & 19 Vict. c. 63, s. 11.

† 21 & 22 Vict. c. 101.

‡ *Id.*, s. 8.

§ 23 & 24 Vict. c. 58.

|| *Id.*, s. 9.

We proceed briefly to consider the Bill now before Parliament, and various suggestions that have been made out of doors.

The Bill of the Chancellor of the Exchequer proposes to do away with any examination by the registering authority, into the conformity to law of the rules proposed to be adopted by a Friendly Society. In so doing, it introduces a principle entirely new; for not one Act of the long series commencing with 1793, not one Bill of all those that have hitherto been presented, not one report of the many laborious committees and commissions who have investigated the subject, has ever proposed to dispense with the examination of the rules, either by justices, by a barrister, or by a registrar. Indeed, an authoritative review of the rules must be made somehow; if not made before registration, it must be made afterwards, whenever it is sought to enforce the rules. If the registering officer is precluded from making it, it will have to be made by the County Court, or whatever other tribunal may be provided for the settlement of such questions.

The practical result of the measure might be to save some expense to the State; but it would inflict upon the societies and their members a new and very heavy tax in the shape of law costs. That which is now done by the Registrar without any charge whatever to the society, would henceforth be done by the County Court judge at a great cost. The decisions given, too, instead of being uniform, as proceeding from one man, would be the result of each individual County Court judge's interpretation of the Act.

Counter-propositions have been made, reviving suggestions which even the Committee of 1849, on whose report the Act of 1850 was founded, were unable to approve. Thus it is proposed "that the Government should cause model tables to be constructed," setting forth the minimum rates of premiums that a Friendly Society should be permitted to charge. That Committee reported that "as the circumstances of human

life, differing according to locality, occupation, and treatment, are so various, and the tables prepared by actuaries of high standing are by no means alike, they could not recommend that the Government should undertake to issue any such model tables; and they thought the Legislature should continue, as heretofore, to leave each society the responsibility of adopting such tables as may be chosen and agreed upon by its own members." The Committee might have gone further, and shown that any issue of model minimum rates would be actually mischievous. Such rates would at once become practically maximum rates; for any society proposing to charge a higher rate than the Government had sanctioned would at once be underbid by some rival society, and would therefore get no members. Every society, therefore, whose circumstances were such that the members stood at greater risk than that was assumed in calculating the model minimum tables would be of necessity driven to bankruptcy, and the Government would guarantee the failure and not the soundness of such societies. It is in no sense the function of the State to guarantee anything whatever, or to dictate the terms of any contract. Those who suggest that model tables should be prepared forget that it is not any natural state or condition which is assured against, when a man subscribes for sickness allowance, but it is a contingency affected by the man's own moral character, his willingness to return to work or to shirk it, by the amount of supervision which his brother members exercise over him, and by a hundred other circumstances, which make each individual society a law to itself.

Another suggestion recently revived is equally wide of the mark. It is, that the State should undertake the audit of the accounts of every Friendly Society. The notion is not a modest one; it is that of organising a staff, at the public expense, sufficient to investigate every year the affairs of 20,000 societies. To be of any use, the audit of each society could hardly take less than one day, exclusive of the time spent in travelling;

but assuming that each inspector took charge of 300 societies, a staff of sixty-six highly paid officers would be necessary to begin with. It may well be doubted whether any public service would be returned for this outlay. No person who is acquainted with the inner life of a Friendly Society, or has inspected the returns forwarded to the Registrar, will feel that an official audit would be of any advantage to the main body of these societies. It may fairly be urged on their behalf that the amount they lose by defalcation of officers is probably less in proportion than that so lost in an equal number of mercantile concerns of any kind.

A third proposition is, to give greater facilities for winding-up. This is, indeed, a cruel kindness. When a Friendly Society finds that it has proceeded upon a miscalculation, nothing is easier than to set it right. There is no organisation which possesses so much elasticity. A penny or so more in the weekly contribution, a 10 per cent. reduction in the benefits, and, above all, greater stringency in the admission of claims and stricter definition of their limits, are enough to set a Friendly Society on its legs, even in a very bad case. The notion that, because an actuary finds that a Friendly Society is not now in possession of all the funds it ought to have to meet its risks, therefore it never will recover itself, is contradicted by the actual experience of many well conducted and now flourishing institutions.

That all these propositions are reactionary is shown by the failure of every successive attempt to make societies sound by Act of Parliament.

Every Statute imposing upon the societies actuarial supervision or tests of soundness has been met by neglect on the part of societies to come under the provisions of the Act, and by an increase in the number of unregistered clubs. The enactments containing such clauses have accordingly been the shortest-lived of any.

On the other hand, the success which has attended the operation of the Act of 1855 shows that the wise liberality

of its provisions has not been unappreciated. Between the 1st August, 1855, and the 31st December, 1868 (according to the reports of the Registrar for England), 13,861 new societies have been registered under that Act, or more than 1000 a year. The number of societies that had been enrolled previous to its passing was 26,034; making a total of 39,895 societies legally constituted since 1793. Of these, however, 14,000 are known to have ceased to exist; and many more cannot be traced.

The main object of those who are anxious to amend the law relating to Friendly Societies, is to place some check on the formation and operations of the Burial Societies, mentioned at the commencement of this article. It is worth their consideration, however, whether that would not be best attained by removing the minimum limit of 20%, contained in the Act\* under which the Government is empowered to grant assurances for sums payable at death. It is desirable, also, to guard against exaggeration, with respect to the mischief supposed to be caused by some of these industrial societies. Their method of working through collectors is certainly expensive; but it is often less costly to the member than the visit which an ordinary Friendly Society requires him to make to the public-house, for the purpose of paying his contributions. If a collector has to make a series of domiciliary visits in connection with payments, which altogether amount only to a few pence, his remuneration must necessarily absorb a considerable percentage of the premiums.

We venture to think, therefore, that the only alteration really desirable in the law, is a return to the principles of the Act of 1855, by repealing the sections of the Act of 1860, which enable the Registrar to declare a society insolvent, and which enable him to institute proceedings against officers or persons misapplying the funds of a society. When once the members have obtained a certificate that their rules are in

\* 27 and 28 Vict. c. 43.



conformity with law, let them be given clearly to understand that it is their part to keep their practice in conformity with their rules. If the State, either expressly or by implication, undertakes to do that for them, or even to see that they do it, it will not only undertake more than it can perform, but it will do more mischief than it will prevent.

The real effect of the present law in this respect has been well defined by a distinguished French writer:—

“There are to be remarked in this legislation,” says M. Laurent,\* “as in all the emanations of the English character, a certain wise reserve in favour of acquired interests and time-honoured usages, and nevertheless a vigorous impulse, as far as may be, to progress and improvement. It also gives proof that just as the undue interference of the State in the affairs of mutual societies would be utterly disastrous, so its rational intervention, received without opposition, and even with gratitude, in the country *par excellence* of self-government, may be of advantage. To place hindrances in the way of bad internal administration of societies; to oblige them in their first organisation to adopt proper regulations; and to lead them voluntarily, in their own interest, to place themselves under the protection of the law; † are the three-fold objects of English legislation:—to enlighten and encourage without attempting to govern, is its leading idea. It is impossible not to admire the high sagacity of such legislation.”

\* *Le Paupérisme et les Associations de Prévoyance. Ouvrage couronné par l'Institut, t. I., p. 410. Paris, 1865.*

† Our translation is free; the expression in the original is somewhat stronger.

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## ART. V.—THE MARRIAGE LAWS OF VARIOUS COUNTRIES, AS AFFECTING THE PROPERTY OF MARRIED WOMEN.\*

BY THE HON. W. BEACH LAWRENCE.

**M**ARRIAGE, according to Grotius and Blackstone, was always a matter *juris gentium*, and with the intercourse now existing between the different portions of the civilized world, and especially between the people of a common descent on the two sides of the Atlantic, every incident connected with it is of general interest. And no citizen of any country marrying abroad or coming to reside abroad after marriage can well know to what extent the laws of other countries on this subject may not be applicable to him.

Important, however, as the protection of the rights of property of married women is, the questions which concern her matrimonial status are of paramount consideration. Marriage, though a contract, is a contract *sui generis*, and among its peculiarities is that it is impossible by rescinding it, after it has been once consummated, to restore one of the parties to the condition which existed before the contract was entered into. The Common Law of Europe, and which is still the law of Scotland, by regarding every promise of marriage made between persons of the age of puberty, followed by consummation, as constituting an irrevocable contract, protected the feebler sex against the stronger, and was the ægis of woman's honour. The decision rendered by your House of Lords in 1843, declaring the presence of a person ordained by a bishop

\* The above is an authentic report of the speech made by Mr. Lawrence, in the discussion on the Married Women's Property Bill, at the Bristol Congress of the Social Science Association in October last. The speech has not been reported elsewhere.

to have been essential by the Common Law of England to the validity of a marriage, it is unnecessary to say created the most profound amazement in the United States. As our law of marriage has no other basis than the law of England as it existed before the time of Lord Hardwicke's Act, if the interposition of a clergyman ordained by a bishop was necessary with you it could not, in the absence of any statutory regulations, have been less obligatory with us.

It is unnecessary, however, to inquire as to the soundness of the decision in the *Queen v. Millis*, rendered by a divided vote of the House of Lords, and against which the eminent judge of the Ecclesiastical Court, Dr. Lushington, on the earliest occasion, so earnestly protested. Neither the necessity of the solemnization by a priest, as contended for by the English Common Law judges, nor the decree of the Council of Trent requiring the presence of the curate and two witnesses to the verification of a marriage between Catholics, impose any additional restrictions on the parties in the contracting of marriage. On the contrary, the Council of Trent, whose professed object it was to establish a system which would prevent for the future scandals arising from the repudiation, by persons belonging to the Church, of clandestine marriages of which the proofs were wanting, refused to declare invalid marriages contracted without the ecclesiastical benediction. At the same time they anathematized all who should say that the marriage of children without the consent of their parents was null.

Constituted as human nature is, every restriction on marriage must operate to induce illicit connections, and such connections, as a general rule, must be based on a sacrifice of the middle and lower classes to the licentiousness of the higher. As it was well expressed by Sir James Mackintosh, the whole legislation of Europe on the subject of marriage has been a contest of patrimony

against matrimony, though, viewed in this light, it is not a little extraordinary that the authors of the Code Napoleon, who had just proclaimed the equality of all citizens, should have referred as an authority for their articles on marriage to the edict of Henry II. of 1556, and to the ordinance of Louis XIII., which were professedly intended to prevent *mésalliances*. If the object of the Code had been to make lawful marriage an exceptional institution and concubinage the normal rule, no more effective enactments could well have been devised than the restrictions which it imposes. The provisions of the Roman law as to parental authority are exaggerated, and while the criminal condemned to the "*travaux forcés*" is deprived of all other civil rights, he retains an absolute veto over the marriage of his children to an age beyond that of legal majority for other purposes, and is entitled to "*actes respectueux*" from them at every age, the absence of which would expose the marriage to be nullified, and which in any event create unjustifiable delay.

The rule early introduced into Germany, which prohibited marriages of members of sovereign houses even with the higher nobility, extended, till modified by the improved legislation of the new confederacy, to all intermarriages between different classes of the community. The laws of many of the German States, more just than the French Code, seem to have contemplated the natural result of a system which imposed innumerable artificial impediments to marriage, and in the Codes of Prussia and Saxony the "*Verlobniss*" forms a separate chapter. Though such connections were terminable without legal proceedings, provision is made for the legitimacy of the children born under them, and in Prussia there is a complete code respecting what the "*Allgemeines Landrecht*" terms marriages of the left hand.

In England legislation against *mésalliances* only goes back about a century. It dates from Lord Hardwicke's

Act, as it was called, passed in 1753. For a long time previous, almost every year, Bills to prevent clandestine marriages, that is to say, to protect the aristocracy against the improvident marriages of their prodigal heirs, passed the House of Lords but failed in the Commons. Lord Hardwicke's Act not only prohibited any suit before an Ecclesiastical Court to compel the celebration *in facie ecclesiæ* of a marriage contracted either *per verba de præsentî* or *per verba de futuro*, but the rule as to the consent of parents, which the Canon Law had never required, was rigorously applied. Moreover an omission of the minutest forms was utterly fatal. Unlike the French judges, who are vested with discretionary power in the case of the omission of the preliminary requirements of the Code to look at the motives, whether the object was clandestinity, or the omission of the formalities was accidental, the reports of the English Courts will show cases where marriages, which had lasted twenty-five years, and in one case nearly forty, were annulled after the birth of children for omissions in the formalities prescribed for obtaining a license, though the license itself was perfectly regular and no suggestion of clandestinity existed. In several cases the judges expressed their regret in being compelled to adjudicate according to the letter of the law, nor was it till 1822 that Lord Hardwicke's Act received any modification. Many of the most stringent provisions of that law no longer exist, but under the Acts of 4 Geo. IV. c. 76 (1823), & 6 and 7 Will. IV. c. 85 (1836) which constitute the present marriage laws of England, though a marriage is not invalid because a license is issued under a wrong name, any mistake of name, however slight, renders void a marriage celebrated after the publication of banns.

It is said, in the report of the Royal Commission made last year, that in all these forms of English marriages, the marriage may be invalidated by a non-compliance with any of the requirements of the law. For instance, if the place where the

marriage is celebrated is not properly consecrated or set apart, or if the marriage is effected in some other locality than where the banns have been called, or if any other error affecting time or place is made by the parties, that entirely invalidates the marriage, although, upon other grounds, there may be no objections whatever to it.

I will not dilate further on what may be deemed only matter introductory to the subject of the present discussion. Accustomed to the jurisprudence of a country where no formal ceremony, civil or religious, is requisite to constitute a valid marriage, and every intendment is made in favour of legitimacy, it is difficult for me to comprehend a system of legislation which, for the mere object, moreover usually ineffectual, of preventing improvident marriages of spendthrift heirs, would sacrifice female virtue to family pride. It was, indeed, with no little astonishment that I read the following remarks, made in a debate of the House of Commons during the last session of Parliament:—"Suppose," it was said, "any gentleman in this House visited at a house in Scotland where a young lady happened to be staying, and that he and the young lady took a walk together, and, in the course of the walk, he took a piece of paper out of his pocket, on which they wrote down a mutual promise to marry, though the piece of paper might be simply put back again into his pocket, and though nobody might be there at the time, and if the persons afterwards lived in a certain way together, that would be a valid marriage, although nobody might know of the fact of the marriage for years afterwards." It seems to me that, so far from this statement aiding the cause for which it was intended, it conclusively establishes the propriety of the Scotch law of marriage. I am very sure that there is no tribunal in my country that would not, under the facts as stated, pronounce the sentence of a valid marriage; nor is there a legislature in any state of America which would enact such a system of marriage laws as would enable the parties, if they desired it, to escape from the relation thus contracted,



whether or not it was evidenced either by a priest or civil officer.

Having alluded to the English law of marriage, I ought not to leave this branch of my subject without referring to the recommendations of the Royal Commission. Though, for the reasons incidentally suggested, I cannot but think that the rights of the weaker sex require the return, pure and simple, to the old common law, very much I believe would be gained by providing, as is proposed, that no marriage celebrated by a minister of religion duly authorized or by a civil officer shall be declared void, for a non-observance of the conditions prescribed for the prevention of clandestine, illegal marriages; and that the preliminary conditions relative to residence, consent of parents, declarations required from the parties, shall only be directory.

Where marriages take place in foreign countries, and especially between persons of different nationalities, important questions of international law present themselves, about which the jurisprudence of England and America is not in accordance with that of the continent. While all agree that the law of the place of celebration must be observed, the French and other countries, where the rule of the personal status prevails, subject their citizens to their own laws, when contracting marriage abroad. Frenchmen, who have not lost their nationality, have two conditions to perform: they must make the publications in their *commune*, and obtain the consent of their parents. Neither the English nor American law pays any regard to these extraterritorial requirements; and the consequence is, that cases exist where parties have been validly married in England or the United States, whose marriages are deemed null in their own country.

The impediments thrown in the way of marriages abroad have induced the passage of Acts of Parliament, authorizing marriages at embassies and consulates, the validity of which, as derogating from the sovereignty of the country where they are solemnized, is considered by the Royal Commission as doubt-



ful. It would seem that this is a matter which requires a conventional arrangement, and so far as the United States and England are respectively concerned, it naturally falls within the scope of legislation required by the arrangements recently entered into by them, in regard to naturalization and its incidents.

Though publicists are pretty generally agreed that it is the law of the husband's domicile or the matrimonial domicile, and not the law of the place of the celebration of the marriage, which, in the absence of any express contract, is to govern the respective rights of the parties, at least as to personal property, there is no general accordance between them as to the effect of a change of domicile after marriage.

In Story's time, it would appear that no case had arisen in the English courts upon the point, as to what rule ought to govern in cases of matrimonial property where there is no express nuptial contract, and there had been a change of domicile. He refers to a case (*Sawer v. Shute*, 1 Anstr. 63) where the Court of Chancery adopted the law of the actual domicile, though to the prejudice of the equitable provision which that tribunal was in the habit of making in favour of married women domiciled in England.

The actual domicile is the law of Louisiana now confirmed by Statute, as to all property acquired after removal into the state. And Judge Redfield, the commentator of Story, contends for it as the suitable rule in all cases. He admits, however, that the Court of Appeals of New York by a divided vote had decided otherwise, holding that the rights of property between married persons continue to be governed, notwithstanding a change of domicile, by the law of the place where the marriage was celebrated, and which was also at the time the place of the domicile of the husband. This is in accordance with the French rule.

There are two systems of law applicable, on the continent of Europe, to the rights of married persons, in neither of which is the individuality of the wife suppressed, as by the

English Common Law, and though in many cases the husband exercises the administration during marriage, the wife's rights of property under one form or other are retained, and the law affords her protection against the improvidence of the husband.

On the continent where the question of woman's right to property arises, it is necessary to decide between the dotal *régime*, which is sometimes purely Roman, and sometimes undergoes very extensive modifications, and the community of goods which is of German origin, and which also exists under various forms. Nowhere are these systems obligatory, except in the absence of express contracts, which in some countries may be made even after marriage. The right to such marriage contracts is entirely in accordance with the express terms of the law and not, as in England and America, in apparent evasion of it.

By the Roman law, on which the modern dotal system is founded, the husband had the sole management of the dowry given by the father to a daughter on the occasion of her marriage, but as a general rule the husband's right to it ceased at the dissolution of the marriage, and it was restored to the wife or her family. Moreover the constitution of a dowry was in no wise essential to the validity of the marriage, and all the property not comprehended in the dowry was paraphernal, of which the wife remained proprietor and over which the husband possessed no rights. By the French law there is the most entire liberty of arranging the interests of the parties by contract, subject only to the condition that it shall not interfere with the general policy of France, and particularly as respects the law of succession. No provision can be made favouring primogeniture or affecting the equality of descent among children. Not only may special stipulations be made, but the parties may in general declare whether they will marry under the law of community, the law of dowry (the general features of which as they existed in the Roman law we

have described), or the law of separation of property, the Code providing the consequences to result from the adoption of any one of these systems.

Nor is it necessary to adopt one of them in its entirety, but they may be modified or blended to suit the views of the parties. In the absence, however, of any declaration the law of community, which may therefore be deemed the Common Law of France, governs. "Under this law, the husband and wife become joint owners of all the personal property which they possess at the time of the marriage, as well as of all such property as they may acquire during the marriage, by succession, or even by gift, unless the donor express the contrary. They are also joint owners of all the real property purchased during the marriage; but such real property as is acquired by succession or gift, unless the donor declares otherwise, does not fall into the community. The husband has the sole management of the property of the community, and may sell or charge it without the concurrence of the wife; he has also the management of all the property of the wife which is excluded from the community, but he cannot alienate such of her real property as is excluded, without her consent; nor can he alienate by will the property that is included, beyond the share of it to which he will be entitled on the dissolution of the community. At the death of either of the parties, an account is taken of the properties and of the liabilities of the community, and the surplus is divided equally between the survivor and the representatives of the deceased."

Under the dotal system, "the husband has, during the marriage, the management of all the property in dowry, but he cannot, either alone or conjointly with the wife, alienate or charge any of the real property, unless provision has been made for this purpose in the marriage contract. The wife may, however, under certain conditions, make provisions thereout for the children of the marriage, or of a former marriage, and the Court will also permit the property in dowry to be sold, in certain cases, such as for releasing the husband from

prison, &c. The wife has the management and enjoyment of such part of her property as has not been settled in dowry, but she cannot alienate nor sue, in respect to this property, without the consent of her husband; or, in the event of his refusal, without the permission of the Court."

Where the parties stipulate by their marriage contract that they will be separate in property, the wife retains the entire management and enjoyment of her property, both real and personal. Each of the parties contribute towards the expenses according to the terms of the contract; if it is silent in this respect, the wife contributes a third of her income, though the Court may, in certain cases, order a larger contribution. The wife cannot, by virtue of any stipulation, alienate her real property without the special consent of her husband, or of the Court, in case of his refusal; and any general authority for this purpose given to the wife, either by the marriage contract or subsequently is void. The community may be confined to mere gains, leaving each party his own property, or there may be universal community which will include real estate as well as personal. The mere declaration that the parties marry without community does not constitute the separation of property so called, in which last case, as we have seen, the wife has the separate control of her property in all respects, except that she cannot dispose of any real estate without her husband's consent. In a marriage declared to be without community, the wife has not the right of administering her property, or receiving the income, which goes to the husband to support the expenses of the marriage; the husband retains the administration of the property, movable and immovable, during his life, with the right of receiving all the personal property brought as her *dot*, or which accrues to her during marriage, subject to the restoration after the dissolution of the marriage or judgment of separation of goods.

In the Spanish law the community is confined to the acquets, and each party retains his or her own property, and is liable for his or her own debts. However, where

there is no inventory made at the time of the marriage, and there is no other means of distinguishing what belongs to each party, the movables are considered as acquets, and subject to the rule of the community. If under the Spanish law the woman renounces the community before the celebration of the marriage, she is married under a rule equivalent to the rule of the separation of property and not of the French *régime* without community. The Spanish jurisprudence admits of a system similar to the French *régime* without community, i.e. a *régime* in which the wife has neither the advantages of community, nor those of the separation of property. But for this purpose it is requisite that such a *régime* be expressly stipulated in the marriage contract. The following are its consequences upon property. The wife has no share in the acquets, neither has she the administration of her separate property, whilst in the absence of such stipulation she would retain that administration, as in the French system of separation of property.

The wife's dowry may be given her either by her parents or by third parties, and either before or during coverture. Parents are bound to furnish a dowry equal to the "*legitime*" (the portion the party would by law be entitled to in the parents' fortune in case of succession), deducting therefrom the property the bride may possess in her own right. The obligation does not exist if she marries without their consent. All the property the wife acquires during coverture as gift, legacy, or succession, is joined to the dowry. The husband is the responsible usufructuary of the dowry. He has the administration of all personal property, but he has to give legal security for its value. Neither the husband, nor wife, nor the two acting together, can charge or mortgage the real estate forming part of the dowry, unless by authorization of a tribunal, and jointly. The husband is bound to supply the deficiency created thereby in the dowry as soon as he is able to do so.

The new Italian Code differs essentially from that of France

on this subject. It has established two *régimes*, the dotal and that of the community. They are both conventional, and there does not exist any legal *régime*. In the silence of the parties, the law does not assume the adoption of either. If there is no special contract of marriage, or if the contract does not adopt either the dotal *régime* or that of the community, the property of the wife is governed by the paraphernal rule, which is identical with the French, except that the Italian law declares that the parties shall contribute to the household charges in proportion to their respective fortunes, while in the French law the woman contributes one-third.

The Common Law of Germany, as well as the Codes of Prussia and of Saxony, fully recognizes the free right of the parties to make what contracts of marriage they please, with the same restrictions as those imposed by the French Code, of not interfering with the State policy, and these nuptial contracts may be made as well during the marriage as before. The parties may, by their contract, dispose reciprocally in favour of each other of any portion of their successions, saving the reserved rights of heirs, and these dispositions are irrevocable. They may, contrary to what the French Code permits, declare their marriage to be according to any of the local laws, customs, or statutes. The dotal *régime* has prevailed in the greater part of Germany, and is that of the Austrian Code, as it is also of the Bavarian. But the principle of community is the law in a great part of what constitutes the Prussian States.

The legal community varies in the different countries where the law of the community prevails. It is universal and comprehends all the property, real and personal, in many of the States. All the laws accord to the widow, as long as she does not marry, certain rights in the property of her husband, either for her life or in full property. The wife may alienate her real estate without the special consent of her husband, unless the local law subjects her to marital authority. The dotal character of the property belonging to the wife is not



presumed. The husband must prove that the dotal property is not paraphernal. If the *dot* is in danger, the wife may claim against third parties the restitution. The wife or her heirs have a general mortgage upon the property of the husband for the restoration of the dower, and they have a legal mortgage upon the property of the husband for the restoration of the paraphernal property.

In Prussia, by marriage the administration of the property of the wife is confided to the husband, except so far as it is reserved to her by the law or by matrimonial conventions. What property each party contributes towards the expenses of the establishment is under the administration of the husband, but in the property reserved to the wife is included everything that relates to her personal use, the nuptial gift (*morgengabe*) and whatever is embraced therein, and she has the administration, usufruct, and free disposition of her reserved fortune. The savings made by a married woman from her reserved fortune belong to her. The immovables and capital inscribed in her name and which she has acquired from an industry separate from that of her husband, form a part of the general contribution (*apport*), unless she carries on a commerce exclusively with her reserved means, and there is a stipulation to the contrary. The authorisation of the husband for her to sue in a court of justice, when the matter relates to her reserved fortune, is unnecessary. The husband exercises all the rights and duties of a life owner over the property of the wife not reserved, but he cannot alienate it or charge it, nor dispose of the capital inscribed in her name, without the consent of the wife. But there are cases—as those of indispensable repairs—where the tribunals will interpose if the wife refuses. The husband has the disposal of the personal property set apart for the maintenance of the family, but he cannot dispose of the reserved personal property. The wife cannot take away from the husband the administration of her portion of the property set apart for the common support, unless she provides for his support

and that of the children in a manner conformable to their condition. When the debts of the wife were made before marriage, her creditors can pursue their claims against her person and all her property, but if these debts have been concealed from the husband, and reduce the contribution for the common support, he may have recourse to her reserved fortune. Community of goods does not exist among the parties, except when established by provincial law. The parties may at all times make mutual contracts of inheritance respecting their successions, and revoke them, but the wife must in this case be assisted by counsel. The dower consists of a pension allowed to the wife by the husband for her support during her widowhood. The wife has a right to the personal property belonging to the household establishment, which includes her outfit entire, the furniture for ordinary use, provisions, &c. The half of the hereditary portion, fixed by the law, to the surviving husband or wife, is regarded in the same light as the shares of the heirs, &c., and subjected to the same rules. Before the division of the property of the husband or wife, the survivor resumes possession of his or her own property.

In Saxony, the general rule, where there is no contract, is that the husband has the usufruct and administration over the fortune which the wife possesses at the conclusion of the marriage, or acquires during marriage. He is responsible for fraud or negligence. There are provisions respecting the *dot*, which is the aggregate of what is given or promised by parents or third parties, as the portion to be applied on behalf of the wife to the common support of the family. There is an obligation on the part of the parents to furnish to the future wife a portion conformable to their fortune, and to the position of the husband. The obligation to furnish a *dot*, however, does not exist if the daughter has a sufficient fortune of her own, or if she marries without consent. With respect to what the wife acquires for services, which have no reference to the affairs of the family or to her husband's position, she has the property

of it, but the husband has the administration and use. If the wife has given such acquests to the husband to be employed for the purposes of the family, or has herself employed them in that way, she cannot, after the dissolution of the marriage, reclaim them. In order to be valid against a third party, the usufructuary title of the husband need not be registered. If the property of the wife is delivered to the husband with a statement of its value, he is responsible for it, and must replace it according to the indicated value. Neither of the parties is obliged to fulfil, out of his own property, the engagements of the other. All the engagements of the wife, validly contracted before or during marriage, must be discharged out of her own fortune, though it is only in certain cases that her reserved fortune is liable for those contracted during marriage. In case, by a bad administration, the husband puts in danger the fortune contributed by the wife for the common support, she may ask that the administration be given to her; and, in case of bankruptcy, the wife may reclaim her fortune according to the inventory. The right of the husband to the administration and use of the fortune, which the wife brings to the common support of the family, expires with the dissolution of the marriage. The husband is required, immediately after the dissolution of the marriage, to restore according to the regulations regarding the usufruct, the fortune which the wife had brought to the marriage. Contracts, by which the consequences resulting from marriage are determined or changed, may be made before or during marriage. If the wife has reserved with the consent of the husband the free disposition of her fortune or of a part of it, or if a third party, who has given a fortune to the wife, has decided that the wife shall have the free disposition of it, the wife may, in the absence of any other clause, dispose, without the co-operation of the husband, of the property thus reserved, administer it, and use it in any way for her own purposes. If the husband and wife agree to admit the general community of the goods, all the fortune which they both possessed at the conclusion of the marriage,

or which has been acquired since, becomes, if no other stipulation exists, common, without any other form, from the time of the conclusion of the contract; and if the contract was concluded before the marriage, from the time of the marriage. The mere acceptance of the community of property confers a right to the inscription in the registers of landed estate or of mortgages of the things and rights, the acquisition of which ordinarily requires such an inscription.

The Austrian Code of 1811 is one of the best systems of jurisprudence in Europe. It applied, till the recent legislative separation of Hungary from the Cis Leithan provinces, to the whole empire. The regulations as to the obligations of the parents to furnish a *dot* are similar to those of the Saxon Code. The dower or nuptial gift is what the husband or a third party gives to a bride as a supplement to the *dot*. She has not the enjoyment of it during marriage and only acquires the property in case she survives her husband. No dowry in the nature of a wife's *dot* is due to the wife, but as the future wife has a right to a *dot* upon the fortune of her parents, so the parents of the future husband ought to provide him an establishment proportionate to their fortune. The *morgengabe* is the present which the future husband promises to give to his wife the morrow of the marriage. When it has been stipulated, it is presumed in case of doubt that it has been given within the three first years of the marriage. The marriage does not of itself establish a community of goods between the husband and wife. It should be stipulated by contract; the form and extent are determined by the Code. In default of express stipulation, each of the married parties preserves his rights of property and of the increase of the acquets during marriage. There is no community between the parties. The husband is presumed to be the administrator of the property of the wife, if she makes no objection. The husband is in this respect considered as the responsible mandatory of the fund or capital only; but he is not required to render an account of the income received during marriage.

Unless there are stipulations to the contrary, his accounts are considered to be liquidated to the day when his administration ceases. The administration of the wife's fortune may, in case of danger for the *dot*, be taken from the husband, even although it had been granted to him by express contract. The widow is entitled to a dower from the time of the death of the husband, which should be paid to her quarterly, in advance. The widow who marries again loses her dower. The validity or nullity of gifts between the husband and wife are regulated by the general rules relating to gifts (donations). The husband and wife may make dispositions in favour of heirs, or make themselves mutually heirs to one another. They may conclude an agreement respecting the succession by which they reciprocally promise and accept the gift of their fortune. To these agreements respecting succession between husband and wife the dispositions relative to contracts in general are applicable. Many of the provisions of the Code apply to the dissolution of marriage by divorce.

I have given a reference to some of the provisions of the laws of the principal states of the continent as to married women's property, to show that the English and American system, based on the merging of the existence of the wife in that of the husband, is altogether exceptional. And in this connection it cannot fail to be noted, that whatever are the rights of the parties independent of contract, and whatever may be their capacity to contract, it is openly avowed in the law itself, the duty of the judges being to expound the law provided for them by the legislature, and not to exercise their ingenuity to evade it. In modern times the separation of the executive judiciary and legislature has been in all constitutional governments deemed essential to the security of persons and property. To what extent the usurpations of Courts of Equity have been carried in the adoption of a system at direct variance with the Common Law, was fully explained in the testimony given before the committee of the House of Commons by Mr. Westlake and

Mr. Hastings. But though they have prevented hardships, exceptional mitigations from such sources can afford no just apology for the retention of laws radically wrong in principle, nor is it for judges to supply or correct the omissions of the legislature. Indeed, the very existence of two independent jurisdictions administering the law of a country is an anomaly, for which it is impossible to find anything but a temporary justification. The system of uses and trusts, on which English professional reputation has been so much based, has only served to render complicate the rights of parties. Forbidden by the French Code, they are, notwithstanding the prestige of centuries, no longer admissible in several of the United States. Though innovations were introduced by the prætors which relaxed the severity of the decemviral laws, yet the equity of Rome, to which it has been attempted to assimilate the English Chancery jurisdiction, even when most distinct from the Civil Law, was always administered by the same tribunals. The prætor was the chief Equity judge, as well as the great Common Law magistrate, and the Roman law, such as it has come down to us from Justinian, consists of one uniform system.

There is this great difference between the contracts elsewhere made and English marriage settlements; that the former, whether they refer to any known *régime* or contain special provisions, are made between the actual parties, and do not require the interposition of third persons, or trustees, on whose solvency and fidelity the rights and interests of the woman may essentially depend. By the law of England, and of the States of the American Union, whose jurisprudence is based on the Common Law, we well know that all the real estate of the wife is during marriage under the absolute control of the husband, and that he is entitled to the entire profits. In the case that a child has at any time been born during the marriage, he is entitled to the entire property during his own life. The ancient law provided some protection for the wife's interest in the very inability of the



transfer of her real estate, but that is now removed by the Act of 3 & 4 Will. IV. c. 74, which without giving her any control over the proceeds, authorises a married woman with the concurrence of her husband to dispose of her real estate by deed. Of terms of years or leasehold property, the husband is not only entitled to the profits and management of them during his life, but he may dispose of them by any act during coverture, and if he survive her they are absolutely his. The only restriction on the husband's absolute property is that he cannot bequeath them by will, and that in case he has made no disposition of them and his wife survives him they remain to her by her original title, and do not go to his executors. As to the personal chattels of the wife belonging to her at marriage or accruing to her during coverture, they become absolutely her husband's, and such is practically the case as to choses in action, unless he dies before they are reduced to possession. If she dies first they are not less absolutely his, in consequence of the technicality interposed of his taking them as administrator. We find enumerated among the exceptions to the absolute right of the husband to his wife's property, her *paraphernalia*. We must not however confound that term as employed in the English law with the paraphernal property in the continental codes to which we have alluded. In the English law it only means her best apparel and ornaments suited to her degree, *if not disposed of by her husband in his lifetime*.

From the very restricted provisions of the recent Acts of Parliament, passed for the relief of married women, we may clearly infer the difference of policy between the English and the continental legislation. The relief thus provided is merely that, if the husband *deserts* his wife without reasonable cause, she may obtain from the justices at petty sessions, or from the Judge Ordinary, an order, under which any money or property she may acquire by her own lawful industry or become possessed of after his *desertion*, will be protected, and belong to her as if she were a *feme sole*. Even in the last edition of

Stephen's Commentaries, dower is enumerated among the compensatory advantages given to woman for the abandonment of all her rights of property and person. It is true, the paragraph says, as to it, "unless some step has been taken to defeat or abridge her right." Dower, under the Common Law, at a time when property was almost exclusively confined to real estate, was a most important provision for a married woman who should survive her husband. But when personal property came to constitute a large portion of the accumulated wealth of the country, instead of endowing the wife from it also, her interests in her husband's stocks and other money investments was left to depend on intestacy or his inclination, as evinced by testamentary dispositions, while the old Common Law right in his real estate has been practically abrogated. By the Common Law, as it formerly existed, a widow was entitled to the third part in value of all lands and tenements of which her husband was seized at any time during coverture, and which any issue that he might have had by her might have by possibility inherited. And such is generally the law in America to this day, as to all property held by the husband, in the conveyance of which the wife has not united. Indeed, I notice in the Act passed in Michigan, in 1867, that the wife expressly retains her Common Law right of dower, while the husband loses his Common Law right of curtesy; and I am not aware of a single case in which, in giving her the control over her own property, the rights previously existing on the property of her husband have been taken from her. It is worthy of note that, by the general statutes of Massachusetts, the consideration paid the wife for releasing dower is put on the same footing with her earnings, both being made her separate property.

In 1836 an Act of Parliament was passed, by which, without making any equivalent for it, it was provided that all dispositions of a husband's land (whether absolute or partial, and whether by conveyance in his lifetime or by will), and all debts and incumbrances to which such land might be

subject, should be valid and effectual, as against the right to dower.

That it is men, not women, who make the laws, may be inferred from the fact that, while dower was virtually abrogated, the incumbrance arising from the tenancy by curtesy was retained. Indeed, we find it preserved in the existing Bill, for which, as respects marriages hereafter to be concluded, it is difficult to suggest a reason. Why not, at all events, place the curtesy of the husband on the same terms as the dower of the wife, which the husband may exclude by testament, while the curtesy still extends to any real estate to which the wife may be entitled at her death?

The provision as to personal property in case of the death of the wife intestate, in giving to the husband the same distributive share as the wife would take in case of his death, seems to be an improvement on the Acts passed by the American States. They, in many cases, leave the old laws untouched, so that in such cases the husband gets the whole.

The general features of the Married Women's Property Bill are that a married woman shall be capable of holding, acquiring, alienating, devising, and bequeathing real and personal property, and of suing and being sued as if she were a *feme sole*. Having the same Common Law the States of the American Union may have with England a reciprocal advantage of learning by the experience of one or other country the effect of any change in legislature before adopting it itself. It was only in 1840, that Vermont set the example of derogating from the marital claims to the wife's property. That example has been followed by a very large portion of the other States of the Union.

The very full investigation before the Committee, and which will be found in the report on the Married Women's Property Bill, renders it unnecessary to examine the laws of the different States in detail. I will merely refer to those of New York, as being the most important State, and the one with which citizens of other countries are most brought in contact.

An Act passed as early as 1840, amended in 1866, allows a married woman to effect insurance in her own name or in the name of a third person for her sole use on the life of her husband, the amount to be payable to her on his death or to her children in case of predecease, free from the husband's representatives or creditors. The only restriction is that the exemption shall not apply where the amount of premium annually paid *out of the funds of the husband* exceeded three hundred dollars.

By the Act of 1848, it was declared that the "real and personal property of any female, who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female. The real and personal property, and the rents, issues, and profits thereof, of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted. Any married female may take by inheritance, or by gift, grant, devise or bequest from any person other than her husband, and hold to her sole and separate use, and convey and *devise real and personal property*, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts."

By the subsequent Acts of 1860 and 1862, it was declared "the property both real and personal, which any married woman now owns, as her sole and separate property; that which comes to her by descent, devise, bequest, gift or grant; that which she acquires by her trade, business, labour or services, carried on or performed on her sole or separate account; that which a woman married in this State owns at the time of her marriage, and the rents, issues and pro-

ceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent. A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labour or services on her sole and separate account, and the earnings of any married woman from her trade, business, labour or services, shall be her sole and separate property, and may be used or invested by her in her own name." It is also provided that any married woman may convey her separate property, sue and be sued, and bring actions for injuries to her person or character in her own name. Her bargains are not binding on her husband. By an Act of 1862, the wife is made liable for costs for suits brought by her out of her separate estate, and a judgment in a suit brought against her may be enforced by an execution against her separate estate.

The mother's assent in writing is made necessary, with the husband's, to the binding of a child to service or to apprenticeship. An Act of 1851 allowed married women to vote at the election of directors or trustees of any incorporated company of which they may be stockholders. An Act passed in 1863 allows the wife to administer without the husband, under letters of administration.

So long ago as the revision of the Statute Law which came into operation in 1830, the State of New York abolished the whole distinction between legal and equitable titles, declaring that by no devise shall there be a mere formal trust in land. Among the few purposes, however, for which express trusts were permitted was that of receiving rents and profits of land, and applying them to the use of a pension for life or for a shorter period. An Act passed in 1849,

enables married women, whose property in compliance with the ancient legislation was put in trust, and which was embraced in the above exception, to resume the control of it. It allows the conveyance to a married woman by the trustee of any property held in trust for her, on the request of the married woman, and a certificate of a justice of the supreme court as to the woman's capacity to manage her property. By the same Act it is declared that all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes effect.

There is one comment which I would make, as well on your Bill as on the American Acts. Where the husband took all his wife's property as well as his own, there was no one but himself to whom to look for defraying the expenses of the household. If her property is preserved to her, there is no reason why she should not contribute to the common *ménage*. This is, in one form or other, the rule of continental Europe. In France, when the marriage is under the separation of goods, she is required to pay one-third.

The Italian law, however, in leaving all her property, in the absence of any contract to the contrary, declares the contribution shall be in proportion to the respective means of the husband and wife. To me, this appears the suitable rule.

It may not be irrelevant to state, as intimately connected with the subject of these remarks, that Statutes exempting *homesteads* from judicial sales now exist in a majority of the states of the American Union. Among others, in Ohio, Illinois, New York, Wisconsin, Massachusetts, Texas, Maine, California, Michigan, New Hampshire, Iowa, Vermont, and, in a qualified manner, in Mississippi, Pennsylvania, Indiana, and Louisiana. In a number of the states—Texas, Wisconsin, Indiana, and California—such exception has been made the subject of express constitutional provision. In all the states the *extent* of the ground of the homestead, or the *value*, is limited; sometimes both, and there is a restriction as to alienation; the husband, if married, being prohibited from



selling or conveying the homestead, unless the wife concurs and signs the conveyance.

The leading object of the homestead exemption is to protect and preserve the home—"a home," according to the language of the decisions, "not for the husband alone, but for his wife and his children, a place where they may live in security beyond the reach of finance and fortune, and the demands of creditors." The provisions of the Act are especially designed to guard the wife and children against the neglect, the misfortunes, and the improvidence of the father and husband. The homestead policy has, moreover, a *political* bearing. "The design," says the Supreme Court of Texas, "is to protect citizens and families, not simply from destitution, but to cherish those feelings of independence so essential to the maintenance of free institutions." On the death of the husband, if the right of the homestead survives to the widow and family, the law will protect them in the enjoyment of such rights from unjust interference on the part of either the heirs-at-law or general creditors.

#### ART. VI.—MR. JUSTICE HAYES.

**T**HE subject of the present memoir affords an instance of a man of great talents and acquirements, and of deservedly high reputation as a lawyer, being little known beyond the circle of his own profession. Considering how much of the work of the Bar is done in public, this may seem extraordinary in the case of a distinguished member of that profession. Such was the case, however, with the late Mr. Justice Hayes, who, although his attainments, general as well as professional, were at once varied and extensive,—he was a sound scholar, possessed of great information, and was one of the wittiest of men,—yet as he was never in Parliament, had not appeared as a leader in many remarkable sensation cases, and as his

career on the Bench was very brief, but few persons not belonging to the legal profession were aware how very gifted a man was the individual whose biography we are about to record.

Mr. Justice Hayes was born at Judd Place, in London, in the year 1805. His father was a Roman Catholic, his mother a Protestant, and in virtue of a compromise, not uncommon in such cases, the boys were brought up in the faith of the father, and the girls in that of the mother. Accordingly, the subject of this memoir was educated partly at the school at Highgate, and partly at the College of St. Edmund's, at Ware. Eventually he determined upon the law as his profession, and he became an articled clerk to the late Mr. Patterson, of Leamington, an eminent solicitor of very high character, and who, although a Roman Catholic, enjoyed the confidence of the Conservative party as their agent for the district in Warwickshire in which he resided.

Mr. Hayes early renounced the Roman Catholic religion, and became a member of the Church of England. On completing his articles with Mr. Patterson he determined on becoming a member of the higher branch of the profession, and accordingly, in November, 1824, he entered the Middle Temple as a student. On the completion of his terms he commenced practice as a special pleader, for which his singularly acute mind peculiarly qualified him. It does not appear, however, that he pursued this occupation very long, as he was called to the Bar by the Middle Temple on the 29th of January, 1830.

Mr. Hayes selected the Midland as his circuit, and regularly attended the Warwickshire Sessions until he received the coif. At the time he joined the Midland Circuit several distinguished members of the profession, who afterwards attained high judicial station, were members of that body. Among them were—Mr., afterwards Lord, Denman, Lord Chief Justice of England, Mr. Serjeant Vaughan, afterwards one of the Barons of the Exchequer, Mr. Serjeant Goulburn,

Mr. Balguy, and Mr. M. D. Hill, afterwards Commissioners of the Court of Bankruptcy, Mr. Waddington, afterwards Under-Secretary of State for the Home Department, and Mr. Mellor, now one of the Judges of the Court of Queen's Bench. Mr. Hayes soon rose into extensive practice as a junior, both at sessions and on the circuit. In sessions' appeal cases he was peculiarly successful and very largely employed; and this class of business, at that period, formed a very lucrative portion of the duties of a junior barrister. Mr. Hayes's practice continued steadily to increase as his leaders on the circuit were promoted to the Bench, and as the attornies obtained experience of his ability and assiduity. During the year 1839 he married Miss Sophia Anne Hill, daughter of Dr. Hill, of Leicester, who survives him, and by whom he leaves a family of four sons and four daughters. In the year 1856 he was raised to the degree of Serjeant-at-Law, and in 1860 he obtained a patent of precedence, to rank next after Mr. A. J. Stephens, Q.C. Soon after this he was appointed Recorder of Leicester, and on the promotion to the Bench of his old friend and colleague Mr. Justice Mellor, he divided the lead of the Midland Circuit with a brilliant and popular advocate, the late Mr. Macaulay, whose premature death will long be remembered with regret by his friends and companions in circuit life. Shortly afterwards came the remodelling of the Northern and Midland Circuit, and the dismemberment and vivisection of the latter learned body.

For ordinary cases before a common jury, Mr. Serjeant Hayes was not so well adapted to be successful as many who were considerably his inferiors in general ability and legal knowledge. His reasoning was too subtle for uneducated minds to comprehend; and his wit, which was very keen and very abundant, was far too refined to tell with them as he intended. And although his speech was fluent, his manner was unimpressive, and gave some persons the idea of his not being thoroughly in earnest. Before a select audience, who could thoroughly appreciate his argument and

his satire, where every word and gesture told to the very utmost,—a speech at a circuit court, or at a judges' dinner—Hayes shone forth as an orator, to whom it was perfect extasy to listen. For a certain class of important cases at the Bar, such as the defence in a libel or breach of promise case, before a special jury who could enter fully into his subtle argument and exquisite raillery, he was more peculiarly, and indeed eminently, qualified to shine. In another case of a very different kind where he had to lead, and which was thrice tried, twice on the Midland Circuit, at Derby, and once at Guildhall—the celebrated Matlock Will Case—Mr. Serjeant Hayes was eminently successful, a result to which his profound knowledge of the law, especially of real property, and his acute and masterly dissection of the evidence, alike contributed. This case was in its different stages three times before the Master of the Rolls, once before the Lords' Justices, once before the House of Lords, and once before the Lord Chancellor. Mr. Serjeant Hayes, who contended that the disputed codicils and testamentary papers were forgeries, and whose case was one of circumstantial against positive evidence, argued on each of these occasions for the defendants. The case of the plaintiffs was supported by the most ample means, and Mr. Serjeant Hayes was, in the course of these various hearings, opposed by nearly all the greatest lawyers and advocates of the Equity Bar, as well as by very distinguished Common Law counsel. His arguments, on all occasions, were of the most masterly order, and displayed in the highest degree a remarkable union of some of the greatest forensic qualities. His speeches were marked by close reasoning and sound logic, by a deep knowledge of human nature, by a keen and telling wit, by a happy raillery which made the audience feel how true it is that—

*Ridiculum acri*

*Plus potest—*

and by a power of interweaving into a harmonious and con-

sistent fabric, a most complicated tissue of minute and almost trivial circumstances, and of giving life and colour to every portion of the structure, such as have very rarely indeed been equalled by any advocate. Amongst his many antagonists in that remarkable case was Sir Hugh Cairns, whose arguments on behalf of the plaintiffs Mr. Serjeant Hayes was accustomed to consider as amongst the most masterly efforts of forensic ability to which it had ever been his fortune to listen.

Shortly after the passing of the Act in 1868, for constituting the superior courts the tribunals for the trial of election petitions in the place of committees of the House of Commons, and by which additional judges were to be appointed, Mr. Serjeant Hayes was selected as one of them, an appointment which gave universal satisfaction to the profession, and conferred great credit on Lord Cairns, who was then Lord Chancellor, as Mr. Serjeant Hayes, although known to be of Conservative bias, had never taken any active part in politics, or attempted to obtain a seat in Parliament, while upon the great questions affecting the Irish Church which were then impending, his opinions were always clearly and unhesitatingly expressed in favour of the policy which has since been carried out by Mr. Gladstone. He was on one occasion, we believe, strongly solicited to offer himself as a candidate for the borough of Warwick, but declined to do so. In many respects he was qualified to make an effective speaker, especially on the opposition side, in the House of Commons. As it is, he owed his promotion to the Bench entirely to his reputation as a lawyer. Although his name does not occur very frequently in the reports as a leader in important cases in Westminster Hall, nor on the circuit so prominently as that of some other men, the depth and soundness of his legal knowledge was proved by the frequent resort which was had to him for his opinion on the cases laid before him, the surest test of the acquirements of a practitioner,

and an excellent preparation for the duties of the Bench; a branch of practice, however, which though very laborious and responsible, is far from being as lucrative as it deserves to be. Mr. Serjeant Hayes received notice of his appointment as one of Her Majesty's Judges of the Court of Queen's Bench on August 9, 1868. He was sworn in during the course of that month, and shortly afterwards received the honour of knighthood.

Sir George Hayes selected his old circuit, the Midland, as the first on which he should appear as a judge, which he accordingly did at the Spring Assizes of 1869, and Warwick, where he had practised so many years at sessions, is now the first town at which the judge arrives. He here received the hearty congratulations of his numerous friends in that county, who were highly delighted by his well deserved promotion; and at Nottingham, a highly complimentary address was presented to him by the professional body of that town and county. At the Summer Assizes of the same year, he was appointed to go the Northern Circuit, the business of which was very heavy, especially at Manchester and Liverpool. The relaxation afforded by the long vacation to one of the junior judges is but partial and of short duration. The circuit came to an end on the 27th August. In the following month he had to attend several days at the Old Bailey, and long before the ostensible end of the vacation his daily attendance at chambers had begun again. He appeared, however, to have entirely recruited his strength, and when he took his seat in the Court of Queen's Bench on the first day of Michaelmas term last, those who knew him best would have asserted with the greatest confidence that his chances of long life and vigorous health were excellent. But these happy anticipations were doomed to early and sudden disappointment.

Mr. Justice Hayes had for some ten or eleven years lived at Esher, and was in the habit of travelling every day to London and back again by the railway. On Friday



morning, November 19, he left his home at the usual time in his usual excellent spirits. But he never saw that home again. He was detained after his arrival at Westminster Hall, by some business which prevented him from taking his seat for half-an-hour after the usual time; but he sat in the Bail Court and tried cases, from half-past ten till between four and five. At the close of the business of the day, he retired as usual to unrobe. He then heard a summons which occupied some considerable time, and then, business being at an end, he turned his thoughts homewards, and with his usual alacrity of manner and motion, unrobed and began to put on his ordinary dress, when a sudden hesitation and feebleness of manner attracted the attention of those about him. He could not tie his cravat. Urged to sit down, he protested he should be better in a moment, and spoke of the atmosphere in which he had sat all day, which had been pestiferous, even for the Bail Court. He swallowed a glass of water, and still insisted that nothing was amiss. But the voice lowered, the speech quivered and faltered, the arm and hand hung helplessly down—the hand of the last enemy was upon him—and the strong frame and the vigorous mind which had been the envy of younger men, the cheerful and even temper, which had been the delight of family and friends, had all done their last work. Paralysis, in the opinion of the eminent physician, Dr. George Johnson, who attended him in his last illness, directly attributable to the foul air he had been breathing for so many hours, had stricken him down, and he lay in the judges' robing room at Westminster, but half conscious of what had happened. He was removed in the course of a few hours to the Westminster Palace Hotel, where those who loved him best were soon at his bedside, to pass some days in those alternations of hope and fear, so well known to those who have watched the last flickerings of the expiring flame of life. The case, however, was beyond human skill or art, and beyond the restorative energy even of his strong constitution, and almost

with the last stroke of ten on the night of Wednesday, November 24, 1869, he breathed his last, and left the world poorer and blanker to many and many a heart.

It is needless to express the deep and universal regret that was felt at the loss of one so gifted, so amiable, and so widely beloved. It only remains that we should endeavour to afford a fair summary of his character as a judge, as an advocate, and as a man. Considering the short period that he presided as a judge, it is very difficult to form a correct estimate of his judicial qualities; as he had hardly had time to find himself at home in his new duties when death deprived him of the opportunity of evincing the capacities he possessed. We could point to several men who left a high judicial reputation behind them that would have been thought of but lightly had they been allowed only a year to obtain experience of the duties of a judge. Moreover, Mr. Justice Hayes was exactly one of those men for whom this experience was especially requisite, in order to qualify him for the complete discharge of judicial functions. In addition to being of a very sensitive and nervous temperament, he had that failing, very common to men of genius, but from which minds of a lower grade are generally exempt, of distrust in his own abilities, which made him occasionally appear hesitating and perplexed. The ideal of perfection in the mind of a man of real ability will be a standard to which even he is unable successfully to attain so as to satisfy his own mind. The ideal of perfection in the mind of an ordinary man will be a standard which he is able easily to reach, and he is, therefore, abundantly satisfied with his own performance. Lord Chancellor Eldon was as full of doubts as Lord Chancellor Campbell was free from them. The very acuteness and subtlety of Mr. Justice Hayes's mind would often conjure up difficulties and perplexities which would not present themselves before one less highly endowed. A judge who does not obtain his promotion until the late period in life at which Mr. Justice Hayes was raised to the Bench, peculiarly stands in need of some experience in his new duties before his

ability efficiently to discharge them can be fairly tested. Of his profound knowledge of the law no doubt can be entertained; of his ability to apply that knowledge we are equally well assured. The defects which stood in the way of the development of those endowments in the manner that some persons might have expected, were physical rather than intellectual, and principally those which time and experience would alone and amply cure. That acuteness of mind, and that refinement of wit which we have already remarked to have rendered him occasionally unintelligible in his addresses to a common jury, would also operate prejudicially in making his charges to them as a judge correspondingly obscure. But we have been struck with the same defect in the summings up of those very distinguished judges, Baron Parke and Mr. Justice Maule.

As an advocate at the Bar, Serjeant Hayes has been said to have lacked "devil." He had not the physical energy and bluster which in some advocates of comparatively commonplace powers seem to carry all before them. In acuteness of argument and in knowledge of law he was never deficient, and his ready wit failed not to second the efforts of his reason. But unless the tribunal to which the appeal was made were competent to comprehend the communication made to them, of what avail was it in the conduct of the case? Possibly, as a very acute advocate, to whose judicial capacities we have already alluded, is reported to have asserted of himself, Mr. Serjeant Hayes might occasionally have resorted with advantage to the "pot of porter" to bring down his intellects to the level of those of the jury.

As a man, George Hayes was at once one of the most amiable, accomplished, and agreeable who ever belonged to the noble profession which he adorned. A writer in the *Times* well remarked of him that "if he thought unkindly of any one he never gave utterance to the thought." There, probably, never was a man whose popularity in Westminster Hall was greater or more wide-spread, or more eminently deserved. It is no idle exaggeration, but the language of plain and literal

truth to say that no human being ever knew him do an unkind thing or say an unkind word. When it is added that his feelings were strong and easily roused, that his wit came to him as readily as mere words to most men, and that it could flash as bright as the sunbeams in a summer's noon, it will be seen that this is no light praise, and indicates no common sweetness of disposition, no ordinary power and habit of self-rule. His conversation was replete with varied information, and was enlivened by a constant stream of wit. One who had been on terms of close intimacy with him for many years writes to us as follows:—"I doubt if you, or if people in general, had any adequate idea how *very* learned and cultivated a man Hayes was. He was so modest and unostentatious that a stranger, or even an acquaintance who did not know him very well, would scarcely suspect how vast and varied his reading was. His knowledge of the English classics was most extensive and accurate. Large portions of Shakespeare were familiar in his mouth as household words. Wordsworth he knew almost by heart. I know that on one occasion he satisfied himself that he had not lost his memory by repeating to himself seventy consecutive sonnets of Wordsworth. His knowledge of ancient and modern history was most extensive. You began to talk to him with reference to some book you had just been reading, and you found that he knew all about the subject and the period. He knew Latin very well and kept it up. He seldom went circuit without a Horace, a Virgil, a Quintilian, or a Tacitus. He knew Greek, though not in the same way, and was very familiar with the thoughts of the Greek philosophers. He was an excellent French and Italian scholar, and had read copiously in both languages. And then his perpetual flow of the keenest and most delicate wit,—never tinged with any shade of harshness,—his shrewd yet tender judgment of others, his habitual respect for the feelings and consciences of his neighbours, his never-failing cheerfulness and cordiality, his total freedom from vain cares and unworthy ambitions, made him lovable to the last extent. I dare say

you know that he was an excellent musician ; played and sang with an exquisite touch, taste, and expression which made it always a treat to listen to him as he wandered up and down the keys, and poured forth the tenderness of his nature and the cheerfulness of his heart in some sweet little bit of improvisation, or broke out into one of Moore's melodies. I believe he knew pretty nearly every one of them. Nor did his taste for the arts end with music. He was an excellent judge of painting and sculpture, and often astonished me by the acuteness, the precision, and the delicacy of his criticism. He was thoroughly conversant with the history of art, too, and had a ready pencil himself. In fact, he was a man of very remarkable accomplishments, as well as of very great natural endowments."

He occasionally exercised his pencil, or rather his pen, by taking sketches in court, some of them exceedingly humorous, illustrations either of the case before it, or of particular points in branches of law. Some of these are now lying before us. Probably, the most extensive record of his wit exists in the humorous, half-earnest elegy in which he lamented the extinction of John Doe and Richard Roe from the pleadings in ejectment, and the expostulations which he puts into the mouth of "Crogate's Ghost" against the law reforms which superseded the learning associated with the once renowned cases named after old Master Crogate. His song on the celebrated case of the "Dog and the Cock"—set to music and occasionally sung by himself—descriptive of a trial where a country jury acquitted a prisoner who was found with a newly killed fowl in his possession, on the suggestion of an ingenious counsel that a dog whom no witness had seen or heard—but as to whom "there might have been a dog although you didn't see it"—had worried the fowl, that the prisoner had come up and rescued the fowl, wrung its neck to put it out of pain, and put it in his pocket "just to give the prosecutor"—will never be forgotten by those who had the good fortune to

hear it. The late Lord Campbell, on the occasion of an argument in the House of Lords in which Serjeant Hayes was engaged, took the opportunity of a temporary adjournment of the House to leave the woolsack and come down to the Bar, where he addressed the learned serjeant in these words—"Brother Hayes, it is one of the infelicities attending my elevation to the woolsack that I shall never again hear the song of 'the Dog and the Cock.'" To the records of his circuit, of which he was for some time Attorney-General, Hayes contributed some excellent presentations, as also an almanac for the use of the circuit, replete with fun and satire.

Such was the man who was alike loved and respected wherever he was known, whose virtues and whose acquirements rendered him the admiration of all who had the privilege of his acquaintance, and whose loss will be the more keenly felt from the impossibility of supplying the vacancy which his premature death occasioned.

#### ART. VII.—A MS. OF VACARIUS.\*

By GEORGE WOODYATT HASTINGS, Barrister-at-Law.

**W**HEN a solitary plank is washed ashore, it may come to us as the tidings of some distant wreck of a noble vessel. Perhaps it bears on its surface signs and tokens which enable us to recognise the name of the ship and the scene and nature of the loss. A somewhat similar interest attaches to the rare and curious MS. concerning which I have undertaken to say a few words this evening. It comes to us as the relic—unique so far as England is concerned—of a great enterprise and a barbarous catastrophe; the enterprise being the introduction into this realm of a system of civilised juris-

\* The above was read as a Paper at a meeting of the Worcester Archæological Society on the 22nd of March last.



prudence, and the catastrophe being the violent destruction, from causes more or less obscure, of the agencies for bringing about so beneficial an improvement.

This piece of wreck, to continue the metaphor for a moment, has been washed to us from a sea of history distant enough to be almost dim in the impressions which it makes upon our minds. In the turbulent reign of Stephen,—if reign it can be called, when two feudal factions were desolating the land with blood and plunder—it happened that the see of Winchester was filled by a brother of the king. This Henry of Winchester was ambitious of promotion to the primacy, and no doubt had reckoned on his brother's aid for the accomplishment of his object. He was bitterly disappointed when Theobald, abbot of Bec in Normandy, was made by the Pope Archbishop of Canterbury, and from that hour a fierce enmity subsisted between the two prelates. In the civil war between Maud and Stephen, Henry of Winchester took the part of the empress queen against his own brother, while Theobald espoused the cause of the king. Henry, anxious to strengthen himself against the archbishop, persuaded the then Pope, Celestin II., to invest him with legatine authority, which placed him, in some respects, above the primate, and enabled him to exert his enmity in the most effectual manner. Theobald, under the advice of the celebrated Thomas à Becket, who had studied law at the University of Bologna, appealed to the Pope, on the ground that as Archbishop of Canterbury he was *legatus natus*, and no one else could claim the authority. Under the same advice Theobald resolved to make a journey to Rome to press his suit in person. He had already gone there once to receive the *pallium*; this was in 1139; he arrived there a second time in 1143, a short time before the death of Celestin II. As the appeal was decided by the succeeding Pope, Eugenius III., in favour of Theobald, in the year 1146, it is clear that the event mentioned in the curious passage which I am about to cite must have taken place not later than in that year. The passage, which relates

most of the facts I have above referred to, is from the old historian, Gervase, or Gervasius, of Canterbury or Dover:—

“Theobaldus ad Romanum pontificem pro pallio profectus est. Quo suscepto à Romano pontifice Innocentio Secundo, Theobaldus in Angliam rediit, et à Cantuaritis honorifice susceptus est. Erat autem in diebus istis Apostolicæ Sedis legatus Henricus, Wintoniensis episcopus, qui erat frater regis. Hic cum de jure legati licet privilegium suum plusquam deceret extenderet in immensum, suumque archiepiscopum et episcopos Angliæ, ut sibi occurrerent, quolibet evocaret, indignatus Theobaldus, et Thomæ clerici Londiniensis industriæ fretus, egit apud Celestinum papam qui Innocentio successit, ut amoto Henrico Theobaldus in Angliâ legatione fungeretur. Oriuntur hinc inde discordiæ graves, lites et appellationes antea inauditæ. Tum leges et causidici in Angliam primo vocati sunt, quorum primus erat magister Vacarius. Hic in Oxonfordiâ legem docuit, apud Romam magister Gracianus et Alexander qui et Rodlandus in proximo papa futurus, canones compilavit.”

The closing allusion to a compilation of the Canon Law has nothing to do with the present subject.

This passage sufficiently establishes the fact that Vacarius was brought to England about the time of the litigation, probably before the close of the litigation, between Theobald and Henry. It is not expressly stated that he was brought by Theobald, but, looking to the circumstances of the case, it would be difficult to doubt it. On the one hand, it is almost incredible that a foreigner could, at that period of our history, have come to our country without invitation and without the shelter of a patron, and have succeeded in establishing himself as a teacher at one of our universities. On the other hand, nothing could be more natural than that Theobald should be anxious to fortify himself, in his struggles with Henry of Winchester, with the opinion of a learned civilian, and his visit to Italy would give him the opportunity of selecting such an adviser from the school of Bologna, then in the zenith of its European reputation. And as a passage,

which I will now quote, from the well-known anonymous "Norman Chronicle" gives a date for his teaching at Oxford which tallies with this view, no reasonable person, I think, will challenge the conclusion that Vacarius came to England in the train of Archbishop Theobald. Under the head of the year 1148, the "Norman Chronicle," which Selden believed to be chiefly an abridgment of a larger work by Robert de Monti, has the following sentences :—

"Obiit Bechardus 6 Abbas Becci, cui successit Rogerius. Magister Vacarius gente Longobardus vir honestus et jurisperitus, cum leges Romanas anno ab incarnatione Domini 1149 in Anglia discipulos doceret, et multi tam divites quam pauperes ad eum causa discendi confluerent, suggestione pauperum de codice et digesta exceptos 9 libros composuit, qui sufficiunt ad omnes legum lites quæ in scholis frequentari solent decidendas, si quis eas perfecte noverit."

This not only corroborates the words of Gervasius, but gives us another link in the chain of this curious history. It shows us that Vacarius was teaching law at Oxford, out of the Pandects of Justinian, in the years 1148 and 1149, and suggests that he must have been there at an earlier date, as he had had time to collect a school so numerous that he thought it worth while to compile an epitome of the whole Roman law for the use of his pupils.

This passage is the most distinct of any which we have on record concerning Vacarius, and yet it is the one from which the errors respecting him have arisen. Selden and Duck, the two English writers on Roman law who have investigated the history of Vacarius, both stumbled over it in a way which led them into a maze of error, and they so complicated the subject with contradictions, that it was at one time doubted, I believe, whether Vacarius had any actual existence, and was other than a sort of mythical embodiment of the advent of Roman law to this country. To the German jurists we

owe the elucidation of the matter; through their exertions the identity of four different copies of the work of Vacarius, at Bruges, Prague, Königsberg, and Berlin, was satisfactorily established; Savigny, in his "History of Roman Law in the Middle Ages," has an elaborate notice of the man, exposing the mistakes of Selden, and the late Professor Wenck of Berlin, the owner of one of the four MSS. I have mentioned, which he bought by accident as an old copy of the Code, published a full account thereof in a small volume, which was purchased a short time since, at my suggestion, for the Worcester Chapter Library, and which now lies on the table.

The whole mistake of Selden arose in the first place from a wrong punctuation. In transcribing the above sentence from the "Norman Chronicle" I have followed the example of Savigny and Wenck, and have placed a full stop after the word "Rogerius." Read in this way the first sentence has nothing to do with those that follow; a distinct person, and distinct events, are referred to. But Selden put no stop at all after "Rogerius," and read the whole passage down to "confluent," at which he put a full stop, as a single sentence. He, therefore, considered that Rogerius and Vacarius were identical, and that this doubly-named individual occupied the abbacy of Bec, in Normandy; but not content with this, he proceeded to identify him with Rogerius Beneventanus, a distinguished civilian, and the author of a work on the code. Selden collected, with his usual exhaustive labour and erudition, every particle of information relating to the history of these three men, and joined them all together into one biography. According to this account Rogerius Beneventanus, after publishing his *Summa Codicis*, and teaching at Bologna, came to England, and founded a school of law at Oxford, where he acquired the name of Vacarius from "vacando," just as Accursius from "accurrendo;" that he was then, on account of his learning and reputation, elected by the monks of Bec to be their abbot, and that he died in the year 1180 after having refused the Archbishopric of

Canterbury. A most extraordinary tissue of mistakes, arising from a mere error in punctuation, which Selden, with all his ingenuity, could not free from a number of inconsistencies and contradictions. In the first place it would be impossible, if his mode of stopping were adopted, to construe the former part of the passage; while the latter, beginning at "suggestion," hangs as it were in the air without support. In the second place Vacarius is described as teaching at Oxford in 1149, and as elected abbot of Bec in 1148, which on Selden's own showing is absurd. In the third place the name of Rogerius, abbot of Bec, was Rogerius *de Bailleul*; and last, it may be added that the placing of the epithet or title "Magister" *between* the names of a person, instead of prefixing it, is utterly unknown. In spite of all these evident discrepancies Selden has been followed in his mistakes by a number of authors, at least as far as the abbacy of Bec and the offer of the archbishopric are concerned; for the confusion between Vacarius and Rogerius Beneventanus is an error too great for many of them to swallow.

Terrason, a French writer, has the following observation on the subject:—

"Selden donne beaucoup de louanges à Vacarius, le confondant avec Roger, disciple d'Irnerius, qui a fait un assez bon traité sur les Préscriptions. Quelques auteurs ont aussi pensé que Vacarius étoit l'auteur de cette somme qui donna tant de jalousie à Placentin. Quoiqu'il en soit, Vacarius enseigna pendant quelque tems le droit dans l'Université d'Oxford, &c : pour le récompenser de ses travaux on lui donna l'abbaye de Bec en Normandie. Quelque tems après l'Archevêché de Canterbury étant venu à vaquer par la mort de Theobalde, qui en étoit titulaire, on voulut y nommer Vacarius, qui le refusa, aimant mieux rester dans son monastère, où il mourut en l'année 1180."

It will be observed that the ingenious Frenchman has not only adopted the greater part of Selden's story, though he does not acknowledge the obligation, but adds, after the

manner of his countrymen, a few embellishments of his own. For instance, he is able, at the distance of six centuries, to divine why Vacarius should have refused the offer of the archbishopric—" *Aimant mieux rester dans son monastère.*" A romantic reason, no doubt, for declining an honour, which unfortunately was never offered for acceptance!

Duck, in his very learned work "*De usu et auctoritate Juris Civilis Romanorum*," blindly followed the mistake of Selden. This is the more remarkable, because Duck in quoting the passage from the "Norman Chronicle," omits the first sentence and commences with the words "Magister Vacarius," so that he servilely follows the error of the author from whom he is copying, though the right reading was staring him in the face.

It is not necessary to allude further to this error, as it has been entirely cleared up by Savigny and Wenck. The former, in his notice of Vacarius, ascribes the origin of the mistake to the fact, already mentioned, that the "Norman Chronicle" was really an abbreviation of the work of Robert de Monti, and that the words which would otherwise have made the passage clear are omitted. But when punctuated properly, it is, in fact, clear enough; and when joined with the words of Gervasius, who expressly mentions *Oxford* as the place where Vacarius taught, the first portion of his history is entirely brought to light. We find him, then, coming to England, probably in the train of Theobald, somewhere about the year 1146 or earlier, and teaching in the University of Oxford certainly down to the year 1149. We find him, moreover, teaching Roman law, a branch of knowledge till then unknown in this country. It was only some ten years since a chance onslaught on the town of Amalfi by some Pisan auxiliaries in the Papal service had brought to light an old copy of the Pandects of Justinian, and the new literature had already spread over Western Europe. Nothing in the history of letters is more marvellous than the rapidity with which the study of Roman



law made its way in every university of Christendom. Yet we can divine some of the causes for the zeal with which the novel science was welcomed. The European nations were then just emerging from the dark turmoil of barbarian inroad. Society had settled into form; civilisation was beginning to grow; the Church had spread the ideas of unity, law, and order. To light at this moment on a system of jurisprudence, embodying the legal wisdom and experience of ages, and dealing with every variety of ethical obligation and proprietary right, must have been like a revelation to an expectant world. Moreover, as an exercise for the human mind, with its keen appetite for knowledge young and fresh upon it, the study was at once admirably fitted and absolutely without a rival. Those who remember, as I can do, the old "acts" at the Universities (whether they have altogether gone the way of all things human I know not), will bear me witness that, as a medium for the mediæval forms of scholastic disputation, the Roman law is, beyond dispute, the best. But it was not the less prized as a substantial acquisition at a time when other learning, save that of theology, was non-existent. Even Roger Bacon, the marvellous precursor of Newton and of his own hardly greater namesake, was still half a century distant. Natural science was unknown; history was in its rudest form; the study of language was of the scantiest.

We can imagine with what fervour a new mental pursuit must have been welcomed by the opening intellect of the twelfth century! In fact, the way in which the Roman law engrossed the minds of all classes, and operated, even among the clergy, to the exclusion of other subjects, is evinced in the extreme jealousy with which it was regarded by the rulers of the ecclesiastical world. Several decrees of the Popes are to this day in existence, in which the study of the Pandects is denounced, at least for clerical students, and the greatest anxiety was shown lest in the famous University of Paris, the faculty of divinity should be injured by the new

studies, which seem in truth to have been in a fair way to overwhelm it with their popularity. We need, therefore, feel no surprise that when Vacarius opened his law school at Oxford, it soon overflowed with pupils. Theobald, in addition to other reasons for bringing Vacarius to England, may have had the enlightened wish to introduce into Oxford the learning of which he must have heard so much in Italy, and the Italian doctor probably commenced his lectures under high patronage. His students were indeed so numerous that they constituted a separate class of themselves, and are believed to have given rise to the *pauperistæ*, who made some figure in the history of the University, and who finally became the objects of great jealousy to the graduates in the faculty of arts. At this time it must be remembered that the University system, as opposed to the College system, was alone in existence; the students at Oxford lived in hostels and lodgings, and flocked to the lectures of the professors; thus a rapid rise in members, or a sudden diversion to the class-room of a new teacher, would take place without much inconvenience.

We have seen that Vacarius, however, did not confine his exertions to lecturing; he prepared, as the "Norman Chronicle" narrates, a *Summa*, or epitome of the whole Roman law, compiled from the Digest as well as the Code, which he arranged in nine books, and especially intended for the use of his poorer pupils. The utility of such an epitome at such a time must have been very great. Copies of the Pandects must have been both scarce and expensive, and to transcribe that huge storehouse of legal precedent and opinion was a laborious task. Here was a volume containing the pith of the whole in moderate compass, and we cannot doubt that thousands of copies must have been made. Not only were they made, but they were carefully conned, as is shown by the addition of various glosses in the few copies which have come down to us. The question naturally arises, why are so few in existence? Why only four in the continent of Europe? Why, more marvellous still, only *one* in the land

where Vacarius was run after and listened to, where he compiled his work, and where thousands of hearers drank in and treasured his words? The answer to this question is to be found, I believe, in the following passage from John of Salisbury, who was a contemporary of Vacarius. This writer was of the clerical profession, and was ultimately made Bishop of Chartres. In this curious passage from his *Polycraticon*, he compares King Stephen to Uzziah and Antiochus, and is alluding to an attempt on the part of the Crown to put down the study of the Roman law by forbidding Vacarius to lecture. Be it remembered that he is deriding all those princes (*tyranni* he terms them) who venture to interfere in Church affairs:—

“Imitantur plurimi Oziam, sacerdotalia præsumentem, sed lepram ejus paucissimi erubescunt. Plures tamen imitantur Antiochum, qui non cum devotione, ut offerat vice sacerdotis, sancta ingreditur, sed ut debeat, si quid est in templo Domini sanctum. Cum enim Antiochus desolationis et abominationis idolum fabricasset, libros legis Dei combussit igni, et scidit eos, et apud quemcunque inveniebantur libri testamenti Domini, et quicunque observabant legem Dei, secundum edictum regis Antiochi trucidabant eum. Vidi temporibus meis nonnullos sacerdotali se immiscentes officio, et humeros temerarie supponentes, ut arcam præriperent ab humeris Levitarum, loci immemores qui in præsentem diem dicitur Ozæ percussio. Alios vidi qui libros legis deputant igni, nec scindere verentur, si in manus eorum jura pervenirent aut canones. Tempore regis Stephani a regno jussæ sunt leges Romanæ, quas in Britanniam domus venerabilis patris Theobaldi Britanniæ primatis asciverat. Ne quis etiam libros retineret edicto regio prohibitum est, et Vacario nostro indictum silentium; sed Deo faciente eo magis virtus legis invaluit, quo eam amplius nitebatur impietas infirmare.”

This remarkable passage plainly records two facts, which are of the utmost importance for present consideration; the one, that a royal edict silenced Vacarius at Oxford; the other, that his books were ordered to be destroyed—*ne quis libros retineret*. This is, no doubt, the explanation of the present

scarcity of the MS., which would otherwise be unaccountable. It is easy to imagine that a great majority of the pupils of Vacarius gave up or destroyed their copies under the dread of a despotic government, and the loss of the epitome would be perhaps less regretted if, as was probably the case, the school of Roman law at Oxford was temporarily broken up. The copies that remained would in all likelihood be placed in monasteries, where they would be safe from the hands of the destroyer; and we should probably be in possession of many of them at the present moment, had it not been for the ruthless destruction of the monastic libraries which is known to have taken place at the period of the Reformation. The only relic of those ancient and invaluable collections are now to be found in the libraries of our cathedrals, which contain many curious, and occasionally valuable manuscripts. It is certainly to be wondered at that no copy of the epitome should be in existence at Oxford, where so many must at one time have been collected, but it is easy to conceive that, supposing the decree for destruction was vigorously carried out, the place where the work was known to abound would be the very one where the most diligent search would be made. No doubt a number of copies were sent to the continent, a means of preserving them, which would be rendered more easy by the close connection then subsisting between England and Normandy; and thus the MSS. previously mentioned were kept safely for future times. Further search abroad, particularly in the conventual libraries of Italy and Spain, might possibly bring more of them to light. It may be added, before proceeding to further remarks, that the circumstance of the study of the Roman law having been forbidden by Stephen is also mentioned by Roger Bacon in a passage quoted by Selden: *Rex quidem Stephanus allatis legibus Italice in Angliam prohibuit, ne ab aliquo retinerentur*. It is to be noted that this author expressly speaks of the Roman law as the law of the *laity*, as opposed to that of the clergy, the Canon Law.

The reasons which led to this arbitrary prohibition of the study of Roman law have been variously stated by different writers. Some suppose that papal influence was used to put down a branch of literature which diverted the minds of the clergy from their more legitimate pursuits, and which threatened to swamp the faculties of theology and Canon Law. But though there can be no question as to the hostility entertained towards the Pandects by the popes of that day, there is certainly no proof of any papal interference in the matter. The expressions of John of Salisbury rather point to the support of Vacarius by the clergy. Ill will on the part of the common lawyers, who are supposed to have been disaffected to the new jurisprudence, has also been conjectured, but of this again there is no proof. The more usual reason alleged is the jealousy that was felt by the graduates in arts towards the flourishing school of Vacarius; and this is the view adopted by Duck, and the one most supported by probability. But whatever the cause of the edict, it is certain that it became in a short time nearly inoperative, the study of Roman law being pursued at Oxford with unabated zeal during the succeeding reigns, when several eminent professors shed a lustre over the school. Our common lawyers consequently drew many of their maxims, to the great benefit of our law, from Justinian's jurisprudence, and Bracton more especially transcribed from the Institutes and Digest. His work alone is a sufficient proof that the Roman law was then generally studied, as he would hardly have plagiarised so fully, save from a volume too well known to need a reference.

The fate of Vacarius after the publication of the edict referred to is somewhat obscure. The date of the edict is generally placed in the year 1150, though Wenck is inclined to think that it was a year or two later. It is certain that the eminent Italian lived for many years afterwards, and that his residence was in this country; but whether he continued to teach law at Oxford after the edict was either repealed or became a dead letter is quite uncertain. We only know that



the study of the *Corpus Juris* in the University was renewed with great success, and that the students in the law faculty were exceedingly numerous; but we are ignorant whether Vacarius was still the professor. It is, however, not improbable that, on the first publication of the edict, he sought the only secure refuge then in existence from regal violence, entering into holy orders. But this is merely matter of conjecture. We know, however, that Vacarius was alive and in England some years after the date of the edict, as there is in existence a decretal epistle of Pope Alexander III., directed *ad abbatem de Fontibus et magistrum Vacarium*, which was concerning a case of supposed bigamy, into which Vacarius was directed to investigate. The papacy of Alexander commenced in 1159, and ended in 1181, and between these dates the publication of the letter must be placed. Wenck thinks, for several reasons which he gives, that Vacarius must, under any circumstances, have been alive after 1164. After this date we lose all trace of him, and are entirely ignorant as to the place and manner of his death; but there can be little doubt that that event took place in England.

Wenck is inclined to think that he entered the Monastery of Wells, and if so his remains probably rest in the old burying ground of that monastery.

To proceed to a description of the MS. lying on the table. It is an epitome of the whole Roman law, and not, as has sometimes been supposed, of the Code alone. It is arranged in nine books (though the copy is not entirely perfect) with a preface and title, and the extracts from the Digest and Code are intermingled, so as to bring together the whole of the law on any particular subject. The *Corpus*, in fact, is systematised as well as epitomised, and the acquirement of its principles thus greatly facilitated. It may be observed that there was a section of the Bolognese school of law who objected to the compilation of any such epitome, and in his preface to his work Vacarius inserted a passage intended to answer these objectors.



After reading, many years since, Wenck's account of Vacarius I became convinced that if there were any copy of the work left in England it might be discovered by searching diligently among collections of the Code, under some copy of which it might lie hidden. But my object in having recourse to the Chapter Library at Worcester was to examine a copy of Azo's *Summa*, Azo being a Bolognese jurist who, like Vacarius, made a compilation of the *Corpus*. The Azo proved genuine, but my attention was attracted by a MS. labelled in the catalogue as "a Code of Justinian, in *nine* books." As the Code has *twelve* books I searched for them, and soon recognising passages from the Digest, I found that I had before me a *Summa* of the Roman law. In a short time I found the very passage, to which I have alluded, written by Vacarius in reply to his Bolognese objectors, and corresponding word for word with that given by Wenck. It is much to be regretted that the three first leaves have been cut out, and that a portion of the end is missing, but it is most fortunate that enough of the preface is left to demonstrate the identity of the MS.

#### ART. VIII.—CHURCH PATRONAGE IN ENGLAND AND SCOTLAND.

**I**N our number for February, 1869 (Vol. XXVIII., p. 267), we had an article on Church Patronage as existing in England. The question had been for some years previously keenly agitated in Scotland, and in the General Assembly of the National Church, held at Edinburgh, in May of that year, some passages of our article were read. The Assembly, by a large majority—193 to 88—came to resolutions to seek, at the hands of the Legislature, some modification of the existing law of patronage.

The resolution was in the following moderate terms—indicative of the national caution:—

“Approve of the report so far as it indicates the evils which have arisen from the existing law of patronage, the advantages which would arise from the abolition thereof, with such compensation to patrons as may appear just and expedient, and in so far as it recommends that the nomination of ministers should be vested in heritors, elders, and communicants, leaving the details, both as to the constitution of the nominating body and the congregation at large, to be arranged so that there should be conferred on the permanent male communicants of each parish the greatest amount of influence in the election of ministers which may be found consistent with the preservation of order and regularity in the proceedings.”

The Assembly addressed petitions to both Houses of Parliament, and a large and influential deputation, including most of the Scotch members of Parliament, waited on the Premier on the subject. Mr. Gladstone, with corresponding caution, requested that a statement of the case should be first submitted to him.

We have now before us the report of the Committee appointed by the Assembly of 1868, with a copious appendix containing the opinions of presbyteries and individual office-bearers of the Church. These, as might be expected, are varied, and often conflicting, but on the whole afford undoubted evidence that the existing law is on a very unsatisfactory basis, and at least its modification has become a matter of imperious necessity. We have also before us the memorial prepared for the Government. It is chiefly historical, and in a small space gives a very accurate outline of the history of the Church in the north, which must be of deep interest to all who desire to know the true basis of the National Church in our sister kingdom, the welfare and fortunes of which it is impossible to dis sever from the more comprehensive State Church of England.

It has been truly said that State Churches are now on their

trial. Since the publication of our article and the meeting of the Scotch Assembly, the Church of Ireland has been disestablished and disendowed, and its members reduced to a voluntary association. Since that event an outcry has been raised that the National Church of Scotland should next share the same fate. In this onslaught the adherents of the Church of England must feel deeply interested. Should the advocates of voluntaryism succeed in Scotland, it will then only be a question of time when the Church of England should follow the doom of her two sister establishments. It is with this view we intend shortly to give an outline of the state of the law of patronage in Scotland and the present movement for its modification.

In our former article we indicated our opinion that "the subject of Church Patronage in England was likely shortly to occupy some share of public attention, and that our whole system of ecclesiastical polity will, at no distant period, be rigorously overhauled, and that important changes in it will certainly be effected." This yaticination of ours it has since been shown has been accurate. We ventured to say then, as we now emphatically repeat, that the question is "no longer how the owner of an advowson may make the most of his property or what facilities should be given to a young clergyman to attain a good living by the money of his friends, but what mode of *administering Church Patronage is most likely to be conducive to the moral and religious welfare of the community.*" Whilst we propounded no particular plan for the exercise of patronage, in general terms we argued for a system under "which the patron would be forced to exercise some sort of *delectus personæ*, while the clergy would be made to feel that the people really formed a power in the Church, and a material guarantee would thus be obtained for the teaching of the Church of England being brought into harmony with popular feeling. That feeling, we were convinced, would in the main be right on all the weightier matters of Christian truth, and even if wrong in any respect, it would

be better to have religion taught in such a way as that people should understand and appreciate it, than to have the most orthodox views set forth before those whom they entirely failed to move."

We are not aware that there is any treatise in which, historically, the subject of patronage is separately detailed. The erudite volume of Dr. Waddilove, as it professes to be, is confined to "*Church Patronage historically, legally, and morally considered in connection with the offence of Simony.*" The learned author labours to exculpate the sale of patronage and advowsons from any connection with Simon Magus, the sorcerer of the Acts of the Apostles. Without some such popular and traditional reference it is difficult to understand the origin of the name in every country where such an offence is proscribed.

Dr. Waddilove traces the origin of Patronage in the Christian Church to the Emperor Justinian in the commencement of the sixth century, and introduced into England by Archbishop Theodore, and frequently regulated by Statute Law, especially the 31 Elizabeth, c. 6; 12 Anne, c. 2; and 9 George IV. c. 94. In England the amount of patronage in the hands of lay patrons is so great as to render it a much more onerous task to deal with its abolition or modification than happily it is in Scotland. Independently of the 1144 Crown patronages, there remain 10,584, whereof 1853 are in the gift of archbishops and bishops, 938 in that of cathedral chapters and other ecclesiastical bodies, 770 in the Universities of Oxford and Cambridge and the colleges of Eton and Winchester, 931 in the ministers of mother churches, and the remainder, 6092, in private individuals (Dr. Waddilove, p. 137, *Census, 1857, Religious Worship*).

In Scotland, as set forth in the memorial of the Committee of the General Assembly, there are 1109 patronages. Of these 319 are in the gift of the Crown. Forty-four are in the hands of town councils, chiefly composed of members of dissenting churches. The Universities have ten. In the

hands of three noblemen there are no less than ninety-one—seven noblemen amongst them have 103, each holding ten and upwards. Thirteen of the same class hold eighty-seven, each holding five and upwards. Other thirteen of the aristocracy hold forty-two, each having more than two, and less than five, patronages. Three baronets and four other patrons, or seven in all, have forty-one. There are eighty-two in the gift of forty-one lay patrons, having two each, and 177 have one each. One grievance is that by far the greater portion of holders of patronage are not members of the Church of which they are patrons; nay, some of their number openly declare their belief that the Presbyterian Church of Scotland is not a true member of the Christian Church. Besides these patronages, 110 churches have popular constitutions, and this number, by the operation of church extension and the endowment scheme, the noble enterprise of the late esteemed Dr. Robertson, is yearly increasing. In this way a very anomalous state of matters is introduced and increasing in the Church establishment, one portion being based on a foundation more or less popular, whilst the greater part being fettered by lay patronage, which may be, and has been, though fortunately in later years to no great extent, exercised by the high hand.

We have not space for the outline of the history of Scotch patronage as given in the Assembly memorial. But one most startling discrepancy between the law of patronage in the two sections of the kingdom has not been (perhaps wisely) alluded to in the memorial. Whilst in England, the next presentation may be sold without the right of patronage itself, this disposal cannot be legally made during a vacancy (31 Elizabeth), but in Scotland, whilst the presentation cannot be sold, the patronage itself may and has been sold during a vacancy, when of course it must of necessity command the highest market value, and secure at once a living to a favoured party.

According to the outline in the Assembly's memorial, the



Scotch Establishment was originally at the Reformation in 1560 based on popular election by the Christian people. But the King made grants of the property, and with it the patronage held by the Popish Church, to the nobility, and hence the unusual amount of patronage still held by the aristocracy. The Act 1592 establishing presbytery, and known as the "Charter of the Church," recognised the existence of patronage. The Church for a period oscillated between the Presbyterian and Episcopal platforms, but patronage was not greatly affected by the change. But when Presbytery was restored in 1638, it was followed by the abolition of patronage by the Act 1649. At the Restoration in 1660, episcopacy and patronage were restored together. But at the Revolution settlement in 1689 presbytery was for the last time declared the national form of Church Government. The Act 1690 reserved the question of patronage, which it declared to have been "greatly abused, and to be inconvenient to be continued in this realm;" and by Act 1693 compensation was provided to be paid to patrons, but this was only carried out in three parishes before patronage was placed on its existing footing by the Act of Queen Anne in 1712. This Statute was passed under the auspices of Harley and Bolingbroke during a period of great political ferment, and for an avowed sinister purpose, and was hurried through both Houses of Parliament in the brief space of a fortnight. Lord Macaulay has truly recorded that this Statute "violated the act of union, and made a change in the constitution of the Church of Scotland. From that change has flowed almost all the dissent now existing in Scotland." The Church loudly remonstrated against this act of injustice, and down to the year 1780 the General Assembly annually recorded a protest against patronage.

For some time after the passing of the Statute of Queen Anne, patrons were reluctant to exercise their restored powers with vigour. The Church, on the "call" or requisition of a



congregation, were wont to collate to the benefice without any presentation from the patrons. In course of time, however, the strength of patronage increased, and the power of the Church to resist declined, so that many forced settlements occurred, where occasionally military force was called in aid to the ordination of a messenger of the Gospel of Peace. The first great secession arising from the abuse of patronage occurred in 1733, headed by Ebenezer Erskine, minister of Stirling. This body eschewed the name of Dissenters, but took that of Seceders, leaving a protest on the Assembly table, and appealed to its first meeting, when free from the yoke of patronage. The second great separation had its origin in the same source, in 1752, headed by Rev. Thomas Gillespie, minister of Carnock, who formed what was termed the "Relief Church"—the prefix denoting their *relief* from patronage, which was the occasion of their exodus. These two bodies gradually increased in numbers; until some years ago, they coalesced under the name of "United Presbyterian," the election of whose ministers has been happily conducted by their congregations. Both before the union and subsequent thereto the seceding Churches received periodical increase of numbers with every objectionable presentation, which unfortunately was not a rare thing. The National Church at length, after ten years of preparation and conflict, in 1834 passed what was called the "Veto Law." The leaders of the Church in this measure acted under the highest legal advice. The Church had ever the form of what was termed *the call*, in addition to, or inclosing the presentation by, the patron. But this call, subscribed by the congregation, had never received the express sanction of law, and it had been a mere form as shown. The presentation was equivalent to the *congé d'elire* of the sovereign to the chapter permitting, but at the same time commanding, the election of a certain named person to a vacant see. So, too, the call, though often signed by the sexton, was held as a mere polite bowing the presentee

into the pulpit. No objection was then admitted, but to life, literature, and doctrine, and no high standard was exacted on either qualification—friends being the sympathizing judges. The Veto Act was thought to revive or legalize the call in a negative form. Where a majority of the male heads of families, without reasons assigned, solemnly objected to receive the presentee, this nullified that presentation, leaving it to the patron to present others in succession, until it fell *jure devoluto* into the hands of the presbytery, but whose appointments were not subject to the like veto. A case soon arose on a presentation by Lord Kinnoul to the parish of Auchterarder. The call was signed only by two, and the veto by a host of parishioners, and the presbytery therefore refused to collate, and the Superior Church Courts supported their refusal. The case was then carried to the Civil Courts. The Court of Session, by a small majority, held the Veto Act to be *ultra vires* of the Church, and ordered the presbytery to take the presentee on trial for collation to the benefice. This they refused, and thereon the members were found personally liable in damages by the Court. But this decree led to a series of most discordant proceedings both on the part of the Courts of the Church and of the law, where both, perhaps, grievously stretched the limits of propriety. The Church Courts suspended and deposed ministers who obeyed the decrees of the Civil Courts, and refused obedience to the orders of the Church Courts. The Civil Courts annulled these ecclesiastical decrees, and went even so far as to interdict the preaching of the word and administration of the sacraments in certain parishes by others not the ministers thereof. This raised the second issue of spiritual independence, which culminated in the last great secession of 1843, forming the “Free Church of Scotland,” and who lay claim to be held the true National Church. Between 400 and 500 ministers, some making great sacrifices, left the Church at this time, carrying with them their congregations, which were increased by

secessions from other congregations whose ministers stood firm to their first love. It is important to notice, as recognising the existence of Patronage as the immediate cause of what, from its magnitude, has been called "*the Disruption*," that in the year previous to the departure (1842) the General Assembly "Resolved and declared that Patronage is a grievance, has been attended with much injury to the cause of true religion in the Church and kingdom, is the main cause of the difficulties in which the Church is at present involved, and ought to be abolished." It was apparent to every discerning mind that some immediate legislative remedy was absolutely necessary to conserve the remnant of the Church by mitigating the rigour of patronage. Lord Aberdeen directed his attention to the important subject and carried the Act 7 Vict. c. 61, or the "*Benefices Act*," much better known by the name of its distinguished author as the "*Aberdeen Act*." Its best friends dare not venture to praise this Statute as a model of perfection. It was kindly intended to give strength and stability to the National Church in its weakness. If it has any similitude to the granite associated with the name of its noble author, the pillars not only want the polish which it usually assumes, but its capitals are sadly unsymmetrical, and far from being Corinthian. The Act can be, and has been, read in two divers ways, either as pro-patronage or anti-patronage—popular or anti-popular. The great difference between this Act and the *Veto Statute* of the Church, which it was intended to supersede, is that, in the latter, objections without reasons were held sufficient on the sole power of numbers. But under the Aberdeen Act special reasons must not only be assigned, but proved by legal evidence. The Act, in one part, expressly declares that the Church Courts are "to have regard only to such objections as are personal to the presentee." But in another part of the Statute, the Church Courts are "to have regard to the character and number of persons by whom the objections shall be proposed."

If a good objection exists against the presentee, it is surely equally so, whether it be stated by units, tens, or hundreds, and if the objection be radically *bad*, it is not in the nature of things that it can be made *good*, though the number enlisted in its support be Legion and their character immaculate. With such a discordant law, it is not matter of surprise that the Statute has been the prolific parent of numerous disputed settlements. The objections most frequently are personal to the *patron* rather than to the *presentee*. If at all affecting the presentee, it is not that the objectors think *bad* of him, but only they think *better* of another whom they fondly hoped the patron would, as requested, have presented to them. The result has been that there is no rule to guide the numerous presbyteries of the Church; and for twenty years the Church has laboured in vain to form a code of regulations for the better working of the Act. Precedents have no authority; not only in successive assemblies but in the very same assembly one presentee is admitted and another rejected, although no distinction is discoverable between the two cases, or if there be any, the difference should, in the view of outsiders, have led diametrically to opposite results.

In the period of twenty-two years after the passing of the "Benefices Act," there were forty-six cases of disputed settlements; of these, twenty-three presentees were inducted in spite of the opposition; ten were rejected; seven withdrew rather than prosecute the presentation in so unsettled a state of the law and practice. The average cost of these cases on both sides, through their various stages, has been moderately estimated at 500*l.*, or 23,000*l.* in all, which would go far to purchase many of the rights of patronage in Scotland. The whole value of these has been estimated at 240,000*l.*; but many of the largest holders of this anomalous and annoying kind of property are not unwilling to make a gratuitous surrender or transfer if satisfied that such will be for the good alike of the Church and people.

Great as is the amount of secession and dissent in Scotland, there is no doubt but that the National Church has within its fold the majority of the people, and it never must be forgotten that the peculiar province and mission of a National Church is to go into the waste places of the land and to gather within its walls the outcasts of the population. The tabulated report of the Registrar-General (1866), set down 43·87 per cent. of the people of Scotland as being married by ministers of the National Church. The Education Commissioners, in 1867, reported two millions out of the three millions of the population to be in connection with the National Church. There appears every reason to believe that, as the existence and exercise of patronage was the cause and occasion of the many great defections from the National Church, so its abolition or substantial modification would be the means of bringing back many to its pale, seeing that no doctrinal or ritual difference exists between all the Presbyterian bodies in the northern land of presbytery.

The Church in their memorial to Government wisely abstain from submitting any plan for legislation, but express their hope that any measure to be proposed "should confer on the permanent male communicants of each parish the greatest amount of influence in the election which may be found consistent with the preservation of order and regularity in the proceedings, and which should at the same time leave with the judicatures of the Church the power of carrying out the provisions of the Statute by regulations framed by themselves, and subject to modification from time to time as experience may dictate."

The ministers and adherents of the National Church of England will watch with deepest interest this movement north of the Tweed, with the hope that the result may be to strengthen the bases of both National Churches in the warm affections of the united people.

ART. IX.—ON THE PROPOSED ABOLITION OF  
COMPULSORY PILOTAGE AS REGARDS  
LIVERPOOL.

**T**HE Government aims at abolishing what is termed Compulsory Pilotage ; or, in other words, the obligation, imposed by law upon the captains of vessels entering or leaving certain ports in the United Kingdom, to take and pay a pilot.

The case, generally, in favour of the abolition is very strong. As to many of the ports in question, pilotage is not always, or even often, necessary for sailing ships. And for steamers, which are rapidly superseding sailing ships, it is less needed, if needed at all. And when it is needed, as in bad weather, or under other exceptional circumstances, the supply of pilots ready and able to give the required assistance seems to be sufficient under the arrangement (already common to some and now proposed to be extended to all our ports), by which the pilotage authorities simply licence pilots who have duly undergone examination, and give them a preference in employment.

But it is doubtful whether there is not at least one exception to the expediency of this measure. The port of Liverpool would seem to prefer a good claim to be regarded with especial care in the application of so sweeping a general principle. The interests at stake are enormous ; and the facts, so far as we can learn them, suggest, to say the least, some hesitation.

The number and tonnage of the ships entering and leaving this port exceed the corresponding amounts for any other port in the world. The entrance of the Mersey is obstructed by sandbanks, extending over an area of at least two hundred square miles ; and the bar, or the shallowest part of the main channel through these banks, lies outside the mouth of the



river, and at a distance of about ten miles. This (the Queen's) channel is constantly shifting, more or less, with the banks it passes through; and at low water, spring tides, has not more than eight or nine feet of water over it—or about half the draft of water required for a large proportion of the ships using it.

In the face of these facts it is impossible not to admit the allegation that there is need for pilotage. The sailing shipowners all say they cannot dispense with such aid. Most of the steam-shipowners say the same. The underwriters, whose especial business it is to estimate the value of the risks arising from such obstructions to navigation, express a similar opinion. Only a few of the owners of steamships, employed on regular lines of traffic, it seems, object to the present "compulsory" system.

Doubtless, as a rule, it is most unwise for the State to compel men to carry on their business in any particular manner. Nay, it may be said that we can hardly make a mistake in permitting every man to risk his property in any way he pleases, provided that he does not injure his neighbour. But shipowners, and especially the owners of lines of large steam-ships, occupy a position in which they can scarcely act without affecting the lives and property of others. Every shipowner, who carries cargo belonging to others, is clearly bound to take all due care of it. It might be added that he is bound to take at least equal care of the lives of the crew. And, as to both, the neglect of any reasonable precaution must be deemed a wrong. There only remains the question whether taking his ship through the sandbanks of the Bay of Liverpool does or does not require special local skill. The best authorities say it does. If they are right, either the captain ought, in every instance, to possess this skill, or he ought to be supplied with it through the aid of a properly qualified pilot.

As the law stands at present, nothing exempts the captain of a vessel about to enter or leave the Mersey from the

duty of taking a pilot, except the fact that he has himself passed examination as a pilot. In other words, the owner must either furnish evidence that his ship is under the guidance of a man who knows and can avoid the local danger, or he must take and pay for a competent local guide. And this would appear to be nothing more than reasonable. -

It has been said, in the course of the discussion, which the measure now under consideration has excited, that we examine and license medical men, but do not compel people to employ them. The analogy is a fair one. But the allegation, as to there being no State compulsion to employ medical men, is hardly correct. Medical science has two functions : (1.) To prevent disease ; and (2.) To cure it when developed. And in nothing is the spirit of modern legislation more clearly apparent than in the extent to which men are enjoined, and, where need is, compelled, to pay for medical aid in preventing disease. No man is allowed to breed fever for his neighbour ; and every man in populous districts, in which the liability to such disease is greatest, is more or less compelled to take and pay for the needful medical superintendence of himself and his neighbours.

In the Bay of Liverpool navigation seems to be, beyond all dispute, liable to exceptional perils—perils only to be avoided by the constant employment of special local skill. Pilotage, there, is prevention. Salvage would be cure. And if pilotage be neglected, salvage, so far as it may be practicable, is the only alternative. But prevention is better than cure. And shipowners, as sea-carriers, being bound to others to use all needful care in the navigation of their vessels, would seem to be under a just obligation either to see that their captains possess the requisite skill or to use that which the local authorities provide for them.

It is worthy of remark that until the year 1766, the taking of pilots for entering the port of Liverpool was optional. But by an Act of that year it was made com-

pulsory. The preamble of the Act expressly states the evils which had then arisen from this system, as a ground for making it compulsory. It has remained so ever since; and a large majority of those immediately concerned are, apparently, desirous that it should so continue.

#### ART. X.—THE LORD CHANCELLOR'S JUDICATURE BILLS.

**T**HESE Bills (the High Court of Justice and the Appellate Jurisdiction) have been committed *pro formâ*, and upon the report a number of amendments were inserted, the Lord Chancellor stating that he proposed to recommit them on the 29th of this month (April). Lord Denman has given notice that he should then move that the High Court of Justice Bill be referred to a select committee.

We believe that this is an accurate statement of the position of the Bills, and having said this, we now say on our own behalf, that in our opinion both these hasty, ill-considered measures will be found to be two of the victims at the massacre of the innocents. When we say this, we are by no means unmindful of the degree of favour with which the legal newspapers regard the Lord Chancellor's efforts in the way of reform (and irrespectively of the fact that the Legislature has more upon its hands than perhaps it ever had, and time may not suffice to pass them) nevertheless we think that the public voice has decidedly been against them, and in our judgment wisely so.

We will briefly call the attention of our readers to that which we think is the true view of the matter. All reform, no matter what, is the result of pressure from without. Especially is this true in all legal reform, for lawyers as a rule, are wedded to what is and has been. It is to the laity, not

to the profession, that the credit is due of making wise and beneficial alteration. It is then upon the great mass of suitors that changes in our procedure operate, and it is for them and for their advantage that changes mainly are made. Hence it follows by inexorable logic, the first changes made should be changes to benefit the great mass of suitors, and not merely those who are exceptionally rich or exceptionally litigious.

If this be right, if this be the true reasoning the Bills before the House of Lords are premature, they are Bills introduced on the Chinese plan, that plan which begins with the chimneys and finishes with the foundation. What, if it were possible, should we think of a builder who consumed material and devoted time and attention to the attics whilst the drawings were in the hands of the architect, and the plan of the house had not even been decided upon?

However improbable, however ridiculous, such a course would be, wherein does such conduct differ from that of Lord Hatherley? The Judicature Commissioners are still taking evidence, whatever may be the surmises as to the second report, nothing is known with certainty, and until that second report is out and the result known, the Legislature would be acting in the dark, nay, more, would be acting without that special information which the Commissioners were appointed to obtain, and without the advantage of that very opinion which, by the fact of the Commission being appointed, was regarded as a condition precedent to legislation.

It may be that in the view of some, the first report of the Commissioners is so distinct from whatever may be their second that it is quite safe to legislate now without waiting. But a moment's reflection will show that, by whatever name or names the Bills now before the Lords may be called, they are in their nature Procedure Bills. They are but the dry bones of the skeleton, the breath of life has yet to be breathed in them by the rules of Court.

The judges will not in all probability make any rules of

Court until the second report is published. It may be safely predicated that they will not, and the Lord Chancellor so far as he is concerned, might just as well have brought in Bills of two or three clauses each, empowering the judges to make rules, as these premature measures, which, if appearances are to be believed, are only born to die, and, did they possess the gift of voice, might well exclaim,—

“What were we begun for  
To be so soon done for?”

If we are right, and these Bills are in their nature, or rather in their operation, Procedure Bills, it is to our mind clear that it is in the last degree unwise to legislate, until the second report of the Commissioners is in the hands of the public.

It must be remembered upon this part of our subject, that the high court of justice is in truth, a court of appeal itself. It will be, assuming for a moment the Bill to pass, and no change made for the present in the County Courts, the Court of Appeal from those tribunals. *Vide* ss. 4 and 13, and sub-section 6 of s. 13.

Our own view is that these Bills are so clearly Procedure Bills that it is not worth while to discuss the question whether they touch or modify the evils which are said to arise by reason of our present system of Law and Equity. Some writers have, while disparaging these measures, nevertheless contrived to praise the large spirit in which they have been conceived, and the breadth and clearness of view exhibited in carrying them out. But in the language of Emerson “the place may be all glorious, it is the detail that is odious,” and it is this “odious detail,” upon which everything depends that is left to judge already sufficiently laden with the burden of their offices.

We cannot help thinking that the Lord Chancellor is not to blame in the matter at all. The Bills were introduced to satisfy the hungry maw of the public demanding reform

in everything, and to show the desire of the Government to satisfy the public mind.

If the view we have thus endeavoured to place before our readers be the true one—if the Bills are at present premature—if they can be correctly and accurately described as Procedure Bills—and if reason shows that it is safer and wiser to wait the further report of the Commissioners—what, may be asked, is the plan we suggest, when it will not be premature to act, but when the time is come for legislation?

We say adopt the same plan then that was adopted before the Common Law Procedure Acts. Confide the preparation of a full and complete measure, founded of course, upon the Commissioners' reports, to some few skilled draughtsmen, acting with and under the direction of some eminent lawyer or lawyers.

The names of several will occur to our readers. The late Lord Chief-Justice of the Common Pleas might thus well employ, and not too onerously, the golden autumn of a great judicial life. It is rumoured that Mr. Justice Willes is about to retire. Would not he, the skilful framer of the earlier Procedure Acts, aid and guide younger men in draughting the Bill? Would not these two great judges, again side by side, be pre-eminently the men for the work? They may be helped by others as eminent as themselves. The question of cost and expense we do not discuss, because, whatever the expense of employing a few eminent men and paying them for their labour would be, it would be but a trifle, at most, when the nature of the work is considered.

So much for that. We have said our say, and think we are but expressing the views of a great number of men entitled to have their opinions respected, and regarding the subject as we do, shall not discuss or criticise the Bills before us as they are merely outlines to be filled up by others—they are not substantive or substantial Reform Bills.

One thing has struck us and our readers probably as well. Could anything exceed the solemnity with which the Irish



Church Bill, the Irish Land Bill, and the Education Bill have been introduced? With what a sense of the importance of the measures, and of the responsibility they entailed! Why should Bills as important in their effect, although it may be, not quite so solemn in their nature, be introduced, palpably only half discussed, confessedly only tentative? Remember that it is not merely the law of property or civil rights that form part of the scope of these Bills. Our criminal law, its conduct, carriage, and operation, needs reform as well, and four-horse coaches are not more behind the requirements of our railroad age than our laws and their operation are behind the moral and social exigencies of our times.

A poet has said—

“Of all the ills which mortal men endure  
How small the part that kings and laws can cure.”

Be it so, but let us nevertheless have laws potent to cure the evils which are bred from want of law, or from its insufficiency. One can hardly help a smile, when it is said that evils alleged to be so great as are the evils of the administration of our law can be cured, or at all events be alleviated by measures such as these we have discussed. If we suffer so much from a divided and hostile system of law, as the advocates of “fusion” say we do, we should have thought that there was no better, no surer way of bringing about a cure, than by adopting a uniform and complete procedure, and thus educate the profession and the Bench to deal with questions of all kinds. Even this will be a work of years—many years, but it will be greatly aided by two things; one aid exists now, the other we hope will soon. The first is found in the fact that “fusion” has already taken place in the County Court, where the judges and practitioners already deal largely with law and equity, and even admiralty, the second aid will be found in the administration of justice in its every branch under one roof.

Our advice is *Festina lente*, a great work has to be done,

a work that may bring about changes larger and greater than many see. Let us have however the whole plan before us before the work is commenced.

## DIGEST OF SCOTCH DECISIONS ON GENERAL POINTS OF LAW.

No. 1. 23 Nov., 1868.—*Roxburgh v. Guthrie*.—41 *Jurist*, 11.

### MARRIAGE—EVIDENCE.

A was regularly married to B, and had children. After his death C brought a declarator of marriage, founding on a verbal declaration of marriage. She called B, and her daughter, on the plea that the first marriage was illegal and incestuous, because that B was step-daughter of A. On the proof of the second marriage of A with C, the Court held the same not proved. Per Lord Neaves—"I am anxious that it should be understood that I recognise, in the fullest manner, the principle of the law of Scotland, that the mutual declaration of a marriage before witnesses *per verba de presenti*, constitutes *ipsum matrimonium*; but then the proof of the facts must be clear and unexceptionable on the one hand, and on the other hand it must be clear that the interchange of consent was deliberate and serious." The witnesses were wholly relatives of the woman, on which Lord Neaves remarked, "It is not only competent but incumbent on the Court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such an extent as to secure confidence that they are telling the truth. Nothing would be easier than for a vicious and designing woman to fasten a marriage on a man by the evidence of her own relatives and associates, and this, more particularly when the man was dead, and his relatives are necessarily at a great disadvantage in disproving the alleged facts, and detecting the imposture." "To sustain a posthumous claim of this kind would be a great and dangerous encouragement to fraudulent attempts of this description, and would fix on the law itself a reproach to which I think it is not obnoxious."

No. 2. 29 Oct., 1868.—*Longworth v. Yelverton*.—41 *Jurist*, 19.

### JURISDICTION.

In a declarator of marriage, the Court of Session assoilsied from the

action, and the House of Lords affirmed the judgment. This was an action to reduce both judgments, as pronounced without jurisdiction, in respect that the defender had no domicile in Scotland. The Court dismissed the action of Reduction, on the ground that on the pursuer's own showing the defender was not subject to the jurisdiction of the Court. Per Lord President (Inglis)—“This action is simply an invitation to the Court to repeat the excess of jurisdiction which they are said formerly to have committed, and if the former judgments be reducible on the ground of excess of jurisdiction, it is obvious that any decree in this action would be equally reducible on the very same ground.” Lord Deas dissented—“I am not disposed to proceed upon the mere difficulty of assigning a known technical name to a plea so radically founded on justice and common sense, as that a party who steals a judgment from a court which has no jurisdiction to pronounce it can, *in limine*, object to the jurisdiction of that Court to declare the judgment a nullity.”

No. 3. 30 Oct., 1868.—*Hay v. Baillie*.—41 *Jurist*, 25.

#### ATTORNEY'S LIABILITY.

THIS was an action by a client against his agent, for a sum said to have been lost by reason of his neglect to use a proper attachment of funds. The agent was assoilzied from the action. Per Lord Neaves—“In order to make out a case of gross negligence against a professional man, there must be a clear statement both of the course that lay before him and that which, in point of fact, he did adopt. An agent deviating from a well-defined course of practice, and making experiments which turn out ill, would be liable for the loss which his client suffers, but to enable the Court to judge of the nature of the deviation, both what was done and what should have been done must be distinctly pointed out.”

No. 4. 3 Nov., 1868.—*Kennedy v. Bell*.—41 *Jurist*, 31.

#### APPEAL IN HOUSE OF LORDS—EXPENSES.

THE House of Lords reversed a judgment of the Court of Session, given at the outset of the cause, and against which the right to appeal was refused. In consequence of this all the subsequent procedure was set aside, and a remit made to assoilzie the defender with expenses. Under this remit the Court found the defender entitled to full expenses, though on some of the subsequent points he was unsuccessful. Per Lord Cowan—“All our interlocutors have been swept away, and it is impossible for us, in these circumstances, to pronounce the defender unsuccessful in any part of the litigation. I must further add that the pursuer has himself in some measure to blame for the result. He might, if so advised, have called the attention of the House of Lords to these matters, and have asked specific directions on the subject of expenses.”

No. 5. 12 Nov., 1868.—*Thomas v. Tennent*.—41 *Jurist*, 59.

SUCCESSION—REVOCATION OF DEED.

A PARTY by a Scotch deed disposed his Scotch estate to his wife in life rent, and to trustees in fee, with directions to sell the estate and apply the proceeds to purposes set forth in a prior English deed, but which was not found, and supposed to have been cancelled. On his deathbed the testator executed an English deed, revoking all prior deeds, and leaving all his estates to trustees, providing that the net income should be paid his widow during her life. The heir-at-law brought a reduction of the deed last in date, as being made on deathbed, and of the second as being revoked by the last deed. *Held* that the Scotch disposition was not revoked by the English will, but that the trust was inoperative by the cancellation of the prior English deed, and therefore the heir-at-law was entitled to the Scotch estate. Per Justice Clerk (Patton)—“Deeds of conveyance may be impliedly revoked by a new conveyance to another party, but there is no implied revocation unless the new deed is effectual.” Per Lord Benholme—“It is settled law that in point of form an English will is *habile* to revoke a Scotch trust disposition, but it entirely depends on the nature and extent of the revocation whether the will operates effectually to revoke the Scotch deed. The question is to what the revocation applies? I have been considerably aided in answering that question by an examination of the terms of the English bequests. The words are ‘freehold, copyhold, and leasehold.’ Not one of these, to my mind, applies to the testator’s Scotch property, which is a subject feued out from a subject superior.”

No. 6. 20 Nov., 1868.—*Maxwell v. Copland*.—41 *Jurist*, 79.

LANDLORD AND TENANT.—TROUT FISHING.

*Held*, in an action of interdict (injunction), at the instance of a landlord against his tenant in a farm, that the latter had no right to fish for trout in a pond on the march, made and stocked with fish by the landlord. The Lord Ordinary (Barcaple) decided for the tenant, holding that “where there is no express reservation, and nothing to indicate that it is intended to reserve the right, it is consistent with general understanding and practice that the right of angling for trout was communicated to the tenant like the other uses of the subject.” The Inner House (Second Division) unanimously reversed. Per Lord Neaves—“A right of trout fishing is an incident to the right of property. It is not a right open to the public, and exercisable by all who have access to the water. There is no property anywhere in trout, in the burn any more than in the running water there. But the right to fish is a privilege to the proprietor of the soil, and no stranger is entitled to take away the trout any more than he is entitled to ladle out the water. Such a right is not let by an ordinary agricultural lease; such a lease is a limited right for a special purpose.

The tenant may have the use of the water, but he has not the right of taking the trout contained in it."

No. 7.—20 Nov., 1868.—*Leitch v. Nilson*.—41 *Jurist*, 83.

#### FREIGHT—CHARTER-PARTY.

A CHARTER-PARTY stipulated that freight should be paid one month after the vessel's sailing. *Held* that freight was due, notwithstanding the vessel was lost within the month. Per Lord Justice Clerk (Patton)—"The stipulation that freight was to be paid on the expiry of a month from sailing was, in effect, a stipulation that the sum stipulated should be paid, irrespective of any contemplated arrival of the vessel. The stipulation, in so far as the actual earning of freight for the voyage was concerned, was just the same as if it had been stipulated on the vessel sailing from Glasgow, or two days after sailing. The case was treated, and properly so, as if the freight had been paid, and were now sought back by way of an action of repetition. It was the natural and plain inference from the undertaking that the payment is absolute, and without the condition of return." The Justice Clerk referred to the English cases, *Saunders v. Drew*, 3 B. and Ad. 445, and *De Silvale v. Kendall*, 4 M. and S. 36, and *Andrews v. Moorhouse*, 5 Taunt. 435.

No. 8. 21 Nov., 1868.—*McCallum v. Patrich*.—41 *Jurist*, 89.

#### FORESHORE—FISHERY ACT.

UNDER the Act 29 Geo. II., c. 23, all persons employed in the fisheries have right of the foreshore below high-water mark, and for a space of 100 yards on waste lands for erecting tents, huts, and stages. *Held* that a proprietor could eject a person who had erected a hut on waste ground a few feet above high-water mark, but for permanent purposes. Per Lord Justice Clerk (Patton)—"It is not intended that fishermen should take possession of any piece of ground, of however little value, and use it to erect a residence, although proprietors are bound to submit to temporary occupation during the time of fishing. Whenever the fishing is over, the fishermen may, I think, be called on to remove their constructions."

No. 9. 25 Nov., 1868.—*Lord Advocate v. Watt and Kerr*.—41 *Jurist*, 91.

#### CRIMINAL CHARGE.

*Held* that "cruel and barbarous usage" is vague and irrelevant, but a charge sustained, "of compelling persons to leave a ship embedded in ice on the high seas, in order to proceed, on foot, across the ice towards the shore, at a great distance, to the danger of life and injury of their persons."



## Notices of New Books.

[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

**The Institutes of Justinian, with English Introduction, Translation, and Notes. By Thomas Collett Sandars, M.A., Barrister-at-Law, late Fellow of Oriel College, Oxford. Fourth Edition. London: Longmans, Green, & Co. 1869.**

It must be a matter of satisfaction to all students of the Roman Law to find that Mr. Sandars' edition of the "Institutes" has reached the fourth issue. When the editor in 1853 presented his first edition to the public, he could scarcely have hoped, in the state of legal studies at that time, for a larger success. The present work is simply a reprint of the third edition, in which the learned author confined his attention to the correction of typographical errors. It is indeed really and substantially only a reprint of the second edition, upon which Mr. Sandars spent some time in revision and correction. This is to be regretted, as in many passages, without wishing to find fault, the translation might have been improved, and a careful review would have enabled the editor to translate several sentences which have been omitted in his version. Besides, so much has been done for the improvement of elementary jurisprudence since the earlier editions of the "Institutes," that the notes might have been greatly enriched if the works of more recent jurists had been consulted. It is a duty an editor owes to himself as well as to the public—we admit it is not always observed—carefully to revise and to endeavour to improve the succeeding editions of both scientific and legal works.

Having said thus much, it is due to Mr. Sandars that we should remember that when his edition of the "Institutes" was first published it was a most valuable boon to the students of jurisprudence in this country. The third edition of the "Institutes," published at Oxford by Dr. Harris in 1812, had been long out of print, and a chance copy could only be obtained at a high price at the "anti-quarian booksellers," as the vendors of old editions are termed in Germany. We are not unmindful when we lay such stress upon the value of the "Institutes," of the publication of other books on



the Roman Law in this country ; but up to the time of the publication of the "Commentaries of Gaius on the Roman Law" in the early part of last year, as an approved elementary treatise the work of Mr. Sandars stood alone.

Mr. Sandars has acted wisely in avoiding as much as possible all difficult and controverted points, and in confining himself to elementary instruction. This, indeed, is the true idea of an institutional treatise which should avoid as much as possible all controverted points. The "Institutes of Justinian," however, should be read and studied, not only by the law student in his elementary course, but also by those lawyers who, by their position and influence, are called to prescribe and regulate the legal studies of both branches of the profession. Nothing can be more erroneous—nothing more shallow, than the remarks continually dinned in our ears, that what our students want is something practical. There are men at the Bar who term themselves "practical men," boasting that they know nothing of the law. When we have a legal University in this country, and when, moreover, the importance of an accurate and deep study of the law comes to be felt, both as an aid in the codification of our jurisprudence and for the administration of justice ; the impossibility of being wisely practical, without being also learned in the principles of the law, will become so apparent, that men who are mere talkers, boasting of their own ignorance of the law, and not jurists, will soon be relegated to their proper place in the profession they have chosen, from which, indeed, in the present state of our jurisprudence, they may derive pecuniary benefit, but which they can never adorn as lawyers. The most distinguished jurists, both at the Bar and on the Bench, have always felt the importance and the value of thorough and exact legal culture. But, further, the "Institutes of Justinian" are not to be regarded merely as a piece of curious, ancient legal workmanship, for they form a constituent part of the modern Roman Law, and as such are an important element in the living law of many millions of the human race. In Germany, for instance, the inapplicability of the Roman Law is only exceptional. Thus, he who appeals to the Roman Law proceeds upon a firm basis ; or, as it is expressed by the civilians, he proceeds upon a "*fundatam intentionem*."

In the country just referred to, Customary Law modifies all other law. The laws of the empire qualified the Canon and the Civil Law. The Canon Law modifies, but only modifies, the Roman Law. Again, among the various elements which constitute what is now designated as the "Corpus Juris Civilis," the "Institutes" occupy a most important position. The Novels indeed precede all other sources. The Code takes the precedence of the Pandects, whilst the better opinion is that the "Institutes" precede the Pandects, if they determine anything new or positive. As a text-book, the "Institutes" occupy a place only second to the "Commentaries of Gaius," which they follow in some passages verbatim and upon which they are carefully modelled. For practical purposes both these institutional treatises are indispensable.

What however is greatly needed at the present time in this country is the establishment of a legal university. For a long period our law studies have been conducted in a disjointed and unsystematic manner. So little attention has been paid by us to the *method* of legal studies, that we are scarcely aware of the inadequacy of our instruction, or we should never have sanctioned the loss of time and the waste of means involved in our utter want of system. The Germans, and other civilized nations, who have given great attention to this subject, have placed the Roman law in the very front of their jurisprudence, and in so doing they have acted wisely. Confining our remarks then to this primary and most important department of juridical instruction, we venture without hesitation to lay down the programme of study which would undoubtedly secure the approval of the great living continental jurists, whose ability and learning so far transcend our own. The "Commentaries of Gaius" should be read as an introduction to the more recent "Institutes of Justinian;" and both these treatises should be followed by the study of some work on the Institutes of the Roman Law, either in English or in one of the continental languages. This course is necessary for two reasons: first, that a glance may be taken of the entire domain of Roman jurisprudence, which cannot be obtained by the simple perusal of the "Commentaries of Gaius" and the "Institutes;" secondly, because during the present century the systematic method of teaching the law, introduced by Savigny, and all but perfected by his disciples of the historical school, has introduced that beautiful arrangement and system, which will be found to be not only attractive to the student, but greatly to facilitate the scientific study of the law. Gaius and Justinian once mastered, and an institutional treatise carefully read—a task by no means difficult for a student who has a talent for legal studies, the next course prescribed should be the "History of Roman Private Law," to be followed by the careful study of what the Germans call "Pandekten," or the "Modern Roman Law." The vicious habit of introducing English case-law should be carefully avoided, as it only tends to perplex, to weary, and to disgust the student. We do not hesitate to assert that if this course were taken, the different branches of our English jurisprudence would be mastered with a facility that would astonish the present teachers of our law. We might have fewer students for the Bar if this course were rigidly enforced, but we should have lawyers who would know not only their own law but also that of Europe, whilst English industry would from time to time furnish great jurists, competent to control the reform of our laws, and in this way to promote the welfare of our great country. We have made these remarks because they will, it is believed, enable the reader to determine the value of the work accomplished by Mr. Sandars and his fellow-labourers in this department of the law. It is quite unnecessary for us to recommend his "Institutes." Whilst other treatises are useful and interesting, Gaius and the "Institutes of Justinian" are indispensable. We place so high a value upon Mr. Sandars' work that we hope he will make every improvement in his power in the future editions.

The Law relating to Protestant Curates, and the Residence of Incumbents on their Benefices in England and Ireland. By C. D. Field, M.A., LL.D. London: Butterworths. 1870.

It would seem from the author's preface that he has compiled this volume to enlighten curates and others, lay as well as clerical, as to the legal rights and liabilities of the former both in England and Ireland, and the more especially has he done so, seeing that by reason of the disestablishment of the National Church in Ireland "all alterations and modifications in the present ecclesiastical law, and all future legislation connected with the Church of that country will, after the 1st January, 1871, be made in synods or conventions, in which the Statute requires that the laity as well as the clergy be represented." Before we proceed to comment briefly on the book itself, we cannot refrain from remarking on its title.

It has not been usual, as far as we know, to designate, either in works on ecclesiastical law, or theology, or history, or biography, or even in tales of fiction, the lower grade of the clergy of the Church of England by the epithet of "Protestant." Such they doubtless are, but it has not been deemed necessary to promulgate the fact. The word curate *per se* distinguishes them from the *curés* of the Romish Church, who are wholly free from the operation of our ecclesiastical law, and are amenable solely to their own superiors as to discipline in doctrine or morals. The dedication tends to disclose the object for adopting the prefix. Its singularity would of itself make it worthy of recital. "To my Father, a Curate\* for thirty-three years in that Church which has most justly been disestablished, this little work is dedicated as a small token of filial gratitude for that care which, amid the *res angustæ* of a Curate's home, yet (*sic*) found the means of guiding mine early footsteps into the paths of knowledge." The approval of the destruction of the Establishment from which our author's father derived his scanty livelihood may be ironical, or it may be sincere, but in either case it is not very seemly to tell his worthy parent that small as his means have been, and although devoted as they have been to so good a purpose, still the source from which he derived them ought not to have existed, except, it may be, on the grounds that it was so unproductive. We will hope, however, that brighter prospects are before him, and that, under the re-organisation of the Church in Ireland, the fact of his having served for thirty-three years as a curate in the defunct Establishment will place him in a better position for the future: but we cited the dedication for the purpose of explaining, if possible, the reason why the word "Protestant" was so prominently and, as we think, unnecessarily introduced: the disestablishment of the Church places curates and priests of the Church of Rome in one respect on the same footing; both will be only legally subject to the municipal law. Each may have its peculiar tribunals to establish rules of

\* Not designated here as Protestant.

discipline and doctrine, but it is only by the ordinary tribunals of the country that the violation of the canons and constitution of the former one can in future be restrained. The decrees or orders of the latter will still have no force beyond the pale of the papal consistory.

It was, as we conceive, to mark the degradation, so to speak, of the clergy of the Church of Ireland consequent on her disestablishment, the desirable destruction of her ascendancy as declared by Mr. Gladstone, that has prompted our author to adopt the epithet "Protestant," rather as a stigma than a designation. We hope we may be wrong in our surmise.

It can scarcely be denied that there is no class of educated men who are in a more helpless or, with all deserved laudation be it said, in a more pitiable condition than the majority of curates. Beyond the fact of their having been ordained or selected at their own request from the herd of mankind for their spiritual office, and their thereby acquiring a certain status in society, what worldly advantage do they enjoy, unless accepted by some incumbent to assist him? and even then, unless by the bishop's sanction in the shape of a licence, they are without employment. Their stipends, even when secured by Statute, are not more than those of skilled mechanics or head servants in a large establishment. Doubtless they have a counterpoise in the reflection that they are serving a heavenly master, and that the sacrifice they make is not for this world. The volume before us would teach them the legal position in which they stand, and as a general axiom, our author cites as his motto—"*Ignorantia juris quod quisque scire tenetur, neminem excusat.*" Doubtless they may, if not already familiar with "Williams's Laws of the Clergy," or "Hodgson's Instructions," or the more modern text-books, derive such information from these pages, but if it is the intention of their author to induce the clergy to ascertain for themselves the law, with all its intricacy (for, with shame be it said, ecclesiastical law is by no means clear or settled) and act without advice, then we must say that he is leading them into a snare.

A great many pages are devoted to the placing side by side English and Irish Acts, showing their discrepancies in *pari materia*. As the book is designed for the instruction of the Irish as well as the English clergy, each may see their own position and contrast it with that of their neighbours. The well-known cases of *Poole v. Bishop of London*, and *Barnes v. Shore*, 1 Robertson's Eccl. Rep., p. 382, and Moore's P. C. C., before the Privy Council, March 13th, 1861, furnish Mr. Field with illustrations of the legal positions that curates cannot perform any divine service without permission of the bishop of the diocese in which they would officiate, in other words without the episcopal licence; and further, that the licence is revocable by the bishop *ex mero motu*, and he cannot be called upon to give his reason for so doing. This does not improve the condition of the curate.

It often happens that curates officiate, although not licensed by the bishop, and this Mr. Field points out as a violation of thirty-sixth and thirty-seventh canons; the two universities, however, may by the



former canon, grant a licence as well as the bishop, no doubt with a view of facilitating the reading of prayers, &c., in the college chapels. The case of *Barnes v. Shore*, as we have already stated, shows that officiating without a licence is an ecclesiastical offence cognizable by law.

In the case of *Hodgson v. Dillon* (2 Curt. Eccl. Rep., 292), Dr. Lushington had previously ruled "That no clergyman of the Church of England had a right to officiate in any way as a clergyman of the Church of England unless he had a lawful authority so to do, and he could only have that authority when he received it at the hand of the bishop, either by institution, as in the case of a benefice, by licence where the party is a perpetual curate, and by licence when the clergyman officiates as a stipendiary curate." Notwithstanding these decisions clergymen do often officiate without authority, and practically no evil results from it, and the bishop does not interfere either by monition or inhibition. An unlicensed curate may, however, be placed in an awkward position as to the payment of his stipend and also as to his dismissal, and in the words of an authority cited by Mr. Field (Dale), he advises every curate to be licensed.

At p. 4 we find this question put, "If the incumbent should die or resign, and the benefice thereby become vacant, is the curate's office determined by such vacancy?" and our author adds, "this question has never, that I am aware of, been judicially settled in England or Ireland," and he proceeds to examine the question, and after doing so he inclines to the opinion that the curacy is not vacated thereby; his strongest point seems to be the analogy he draws between the office of a curate and that of a parish clerk. There is, however, this material difference—the office of a parish clerk is a freehold for life, he is not licensed by any one and he cannot be removed without a formal charge of misconduct being made against him, and can be heard in his defence, whereas the bishop may, at any time, and without cause assigned, revoke the curate's licence, and it may reasonably be supposed the bishop would not hesitate to do so if a curate persisted in holding his office where an incumbent, and it may be a stranger to him, and differing from him in matters of doctrine and form, represented those facts and sought redress. Whatever may be the custom in Ireland it is well established in England, that upon a change of incumbency, the curate, after due notice, gives up his curacy. To revert for a moment to Mr. Field's analogy between the position of a curate and that of a parish clerk. The case on which he founds his conclusion is *Pinder v. Barr* (4 Ell. & Bl. 3), and his words are "Mr. Justice Crompton said, 'suppose there are a rector and a curate, and the rector dies, and then before a new rector is appointed the clerk dies, can the curate appoint?' And it was answered in the affirmative. That is, the curate not having left his cure could appoint a parish clerk. The point decided was, 'a stipendiary curate nominated by the ordinary to the care of a vicarage during the suspension of the vicar was a minister of the place for the time being, so as to entitle him to appoint the clerk.'"

But the 1 & 2 Vict. c. 106 (commonly called The Church Discipline Act) disposes of the question; for by its ninety-fifth section it is enacted that every curate shall quit and give up the cure of any benefice which shall become vacant upon having six weeks' notice from the spiritual person admitted, &c. ; such curacy to be vacated within six months of the admission of the incumbent, and in other cases the incumbent, with the bishop's permission, may dismiss a curate on giving six months' notice. (See "*Burn's Ecclesiastical Law*" by Phillimore, tit. Curates, Vol. II., p. 75). See also "*Stephens's Laws of the Clergy*" (Vol. I., p. 395), where the forms of notice to quit are given.

As to residence of incumbents, we have the two Acts bearing on the subject—the English Act (1 & 2 Vict. c. 106) and the Irish Act (54 Geo. IV. c. 91) placed side by side, and their discrepancies pointed out—a convenient mode of ascertaining the law of both parts of the empire.

Non-residence by the clergy is, however, not now so flagrant as it was, and pluralities have almost practically ceased to exist.

Before we conclude this brief review, we must glance at the concluding chapter, which treats of the law affecting the clergy in Ireland, by the provisions of the Irish Church Act of 1869 (32 & 33 Vict. c. 42), the Act effecting the disestablishment of that Church, and from this we gather that from the 1st of January, 1871, archbishops, bishops, and other ecclesiastical persons will cease to have any coercive jurisdiction, the Ecclesiastical Courts will be abolished, and the whole of the Ecclesiastical Law, except in so far as related to matrimonial causes and matters, will cease to exist as law. With a diffidence, which is amusing after the bold avowal in the dedication, our author adds, "It is not within the province of this work to anticipate the difficult and important questions which will arise when the above changes are called into operation."

In his next work on ecclesiastical law we may hope to find some solutions respecting them: in the meantime, we must be content with the anticipation of so great a boon.

*An Analysis and Summary of the Roman Law.* By T. Whitcombe Greene, B.C.L., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Son. 1870.

We have much satisfaction in recommending Mr. Greene's work to all students of the Roman Law. The analysis is derived from the "*Commentaries of Gaius*" and the "*Institutes of Justinian*," and has been performed with much care and accuracy by one who is obviously master of the subject. It will be found useful either as an introduction to the study of the Roman Law, or as a means of keeping before the minds of those who have made some advancement in it, the leading principles of that great system of jurisprudence. Mr. Greene has seized the essential features of the Roman Law, and has set them forth in a concise and intelligible manner. Considering the great importance of the study of the Roman Law in this



country at the present day, the appearance of this work is fully justified; and we strongly advise such of our readers as have hitherto neglected this interesting branch of legal knowledge, to read Mr. Greene's work, where they will find much information in a short compass, and a clear statement of principles and rules, of which every English lawyer ought at least to know something.

**An Historical Account of the Neutrality of Great Britain during the American Civil War.** By Montague Bernard, Chichele Professor of International Law. Oxford. London: Longmans & Co. 1870.

INDEPENDENTLY of the value of this book as an historical notice of the principal facts in connection with the neutrality of Great Britain during the recent civil war in America, its appearance at this time is opportune, especially for two reasons. In the first place it denotes that the interest taken in the examination of questions of International Law—a branch of jurisprudence which has, in this country, hardly met with that attention it deserves—is at least sustained at Oxford, if it cannot be said to have made any very decided progress; and, secondly, because it is well that at this distance of time, when the minds of men have somewhat cooled, there should be placed on record the results of an examination into the judicial history of that great struggle which at one time threatened not only to rend asunder the great American Republic, but to endanger the neutral position which from the first it was the chief desire of this country to maintain towards both parties in the contest. Some of these questions can hardly even now be considered to be definitively settled, and one of them in particular may possibly give rise to grave complications; but to the understanding of these points of difference it is of importance that they should be clearly stated, and with a freedom from conscious bias. In this respect the present work will do good service, and we therefore consider its publication as a contribution of value to the literature of public law.

Our space will not allow of doing more, on this occasion, than to notice very briefly one or two of those vexed questions in the maritime law of nations which it came within Professor Bernard's purpose to treat of. But before doing so it will be useful to our readers to give an outline of the writer's method in the treatment of his subject.

His first object was to give a succinct and connected historical account of the questions which arose between this country and the United States as bearing on the rights and duties of belligerents and neutrals. He then proceeds to investigate generally, in the light of this narrative, the conduct of the British Government in relation to the war, using as his materials chiefly the despatches and State papers which have been published by the two governments; and when, in the course of this inquiry, he has had occasion to notice not merely the facts but the reasoning deducible from them, he draws the reader's attention to such of the arguments as appear relevant or material to the point he has undertaken to examine.

Amongst these will be found many cases and questions of interest to the student of public law. Of the former we noticed, amongst others, the cases of the *Trent*, the *Alabama*, and the *Nashville*, as illustrating respectively the laws of contraband, neutrality, as connected with public mail-carrying vessels, and the rule known as that of "twenty-four hours," a principle enforced under the law of nations when armed ships of belligerents find themselves, at one and the same time, within the ports of a neutral state. And of the latter are discussed the doctrines of blockade, of what is known as the doctrine "of continuous voyage," in connection with a colourable as opposed to a *bonâ fide* neutral terminus of a voyage, and questions of prize law as bearing on conditions in restraint of private trade on the part of subjects of the belligerent states.

In the celebrated case of the *Trent*, which we select by way of illustration, Professor Bernard, although declining to enter into a discussion on the case itself or to criticise the arguments on either side, has stated the questions which he considers were involved in the case, and the situation in which it left them. These questions are, in his opinion, two: namely, whether it was lawful for a belligerent, exercising his right of visit and search on the high seas, to take persons, not serving the enemy in a military capacity, out of a neutral ship, and secondly, does a neutral ship forfeit that character and expose itself to condemnation by conveying as passengers from one neutral port to another diplomatic agents of the enemy on their way to a neutral country? From these points he considers that several other inferences follow, which he has stated as propositions of law, growing out of the case in question. But it may well be doubted whether this case, celebrated as it was at the time, deserves the important place which Professor Bernard would assign to it as illustrating any old principle, or bringing into controversy any new doctrine of international law. It, in truth, did neither. No doubt had the American commander taken the only course which it was open to him under the law of nations to adopt, namely, to bring his prize into port for adjudication, these and other points in the law of nations would have been raised and discussed; but the notorious illegality of the procedure in the fact of the Confederate agents being taken out of a vessel which was *allowed to proceed on her course*, rendered the position of the United States so untenable as to make the surrender of the envoys a matter of diplomatic necessity. But, as observed by a distinguished American publicist, the only position which the *Trent* case served to establish was this—that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea, whatever may be the claims of her Government upon those persons. It settled no other principle, nor did it render more clear any question in the maritime law of nations which had previously been the subject of dispute.\*

In his chapter on blockade, Professor Bernard has noticed the "important doctrine, of "continuous voyages" as it is termed, which

\* Dana: Ed. of Wheaton Inter. Law, p. 462.

has received practical illustration and decision in the Prize Courts of the United States, and recently in a celebrated case in the Court of Common Pleas in England.\* The point raised in cases where this doctrine comes in question is this: whether goods, ostensibly intended for a neutral port, may be lawfully captured in the first stage of their journey to an enemy's port, the two stages being regarded as in reality, one. Upon this doctrine—of great importance, chiefly in cases of marine insurance—the work before us contains many papers of value; but one aspect, and quite a novel one, which the great doctrine of blockade assumed during the American war, has hardly met with the notice it deserves. We refer to what is known as a “commercial” as distinct from a belligerent blockade; that is to say, blockades of commercial towns, not being naval stations or military posts, instituted for the purpose of merely closing them against commerce, and not as a part of war-like operations directed to the capture of the place, or its actual investment or siege. Of a blockade of this character, the civil war of 1861-65, presents the greatest example which had ever yet been known, and which was attended with extraordinary success in diminishing the resources of the enemy, and compelling their final surrender.† Its legal incidents, however, still remain in a very undecided state.

There are many other questions noticed in Professor Bernard's book, to which we would gladly direct attention if our space allowed. The subject for instance (p. 109) of the harsh consequences flowing from the technical identification of the subject and citizen of a belligerent State, as bearing on the immunity of private property at sea, is referred to as one which sooner or later must be modified, if not wholly done away with. Again he animadverts with much justice (p. 49) upon the distinctive operation of that rule of public maritime law, which sanctions the destruction of a prize in cases where, owing to a blockade or other cause, it cannot be carried into the ports of the captor. This practice, although not prohibited by international law or usage, is yet, as the learned writer observes, “an aggravation of the waste and havoc which are inseparable from hostilities directed against private property.” It is, in truth, an offspring of that system of public law to which, in this country, Lord Stowell lent all his genius and abilities to sustain and enforce, and which regarded the sanctions of public law, as then most properly employed when they gave effect, sometimes in the most extreme form, to the rights of belligerents. To the rights of neutrals or of peaceful commerce, but little regard was had; and thus it was, that private property was regarded as so intimately connected with the equipment of an enemy's state, that it was considered as legitimately a subject for destruction, as if it had been captured in an hostile ship in open conflict.

With this brief notice, we take leave of a book which is marked by much learning and care in its preparation.

\* *Hobbs v. Hemming*, 17 Com. Bench, N.S., p. 791.

† See an interesting note by Mr. Dana, in his edition of Wheaton, p. 510.

Transactions of the National Association for the Promotion of Social Science, Bristol Meeting, 1869. Edited by Edwin Pears, LL.B., General Secretary of the Association. London: Longmans & Co. 1870.

It is obviously with the Jurisprudence Department of the National Association that we have most concern in the pages of this magazine. Our readers will remember that this Department is the old Law Amendment Society under a new name. The Society, famous for the efforts of a band of law reformers such as this country has not seen elsewhere, famous above all, as that in which Brougham played so conspicuous and so useful a part, is still carrying on a vigorous existence. Its president for the current year is Mr. G. W. Hastings. His address at Bristol occupies sixteen pages. Mr. Hastings begins by defining the nature of the problems to be solved by the science of law. Society, led by its best and wisest, struggles to abate the evil its own action engenders, to clear the stream of its progress from the more turbid elements. Hence laws become necessary to regulate, repress, and reform. The questions, how are these laws to be framed, how the greatest good is to be secured with the least evil, how the largest liberty of the individual is to be reconciled with the least damage to the individual good; how, in fact, the machine of society is to be adjusted to the inexorable necessities of its existence, constitute the great problem to be solved by the science of law. This idea is illustrated by reference to the different Departments of Criminal Law and Civil Procedure. Mr. Hastings then refers to the Evidence Further Amendment Bill, to the Married Women's Property Bill, and the Bankruptcy Bill of last session. As a subject worthy the attention of the Department during the Congress he specially recommends the question of the introduction of a system of public prosecution. The address concludes with an appeal for an improvement in the outward form of our National Jurisprudence. It must be cast into a condensed and accessible shape—call it a code, digest, or what you will—before it can reach the intelligence, or minister to the wants, and consequently command the respect, of the people.

In the Jurisprudence Section there were three special questions under discussion. The first was, "What ought to be the legal and constitutional relations between England and her colonies?" An able paper was read on this subject by Mr. Gorst. Mr. Thomas Hare treats the subject *more suo*, ably of course, but principally as a question of representation. Mr. John Noble's paper represents the Manchester view, and is rather an argument for getting rid of the colonies than an answer to the special question. Other papers and a very animated discussion follows. A strong feeling runs through the speeches in favour of permanent maintenance of the integrity of the whole empire. Opinion seems to have been favourable to the creation of a council to assist the Secretary of State for the Colonies on the same footing as the council now attached to the India



Office—the members of the council to be elected by the various colonies of the empire. The second special question was, “What limits ought to be placed by law on charitable endowments?” A paper on this subject by Mr. Lewis Fry introduced a good discussion. “What ought to be the principles regulating the ownership and regulation of land?” was the third special question. It is impossible on reading the question itself not to remark that a satisfactory answer ought to be possible, if we are to legislate for the Irish land difficulty. Clearly, the present House of Commons is not of one mind on this question. The Patent Laws, of course, come in for a share of attention. In the Reformatory Section, Mr. Serjeant Pulling contributes a paper on the Public Prosecutor question. The discussion which follows is peculiarly valuable as pointing out the failure of justice, the delay, the expense, and the other evils of the present system.

In addition to the valuable papers to which we have alluded, the volume contains a great variety of readable matter. We know that its publication is looked anxiously forward to in many of our colonies. Together with its predecessors it forms a mine of valuable information on a great variety of public topics. Questions relating to Law and Social Reform are continually appearing and reappearing before the public. Now a particular question is prominent, and in a short time it is apparently forgotten; but its time comes round again, and the questions press on us until they have been dealt with. When such questions reappear, if our readers will turn to the pages of the “Transactions” of this Association they will usually find nearly everything that can be wisely said on them. They will find, too, that the work of educating public opinion is at once very slow but very sure.

**Chronological Table of, and Index to, the Statutes to the end of the Session of 1869. By authority. London: Eyre & Spottiswoode. 1870.**

WE believe we are indebted to Lord Cairns for having put in motion the preparation of a Chronological Table and Index of the revised Statutes up to the present time. In April, 1867, a memorandum was communicated by his lordship, then Sir Hugh Cairns, to Lord Chancellor Chelmsford, in which he made some valuable suggestions as to the desirability of preparing a Table and Index affording ready means of ascertaining what is the existing Statute Law on any given subject; a table which should be kept always complete, by being periodically corrected, so as to represent exactly the actual state of legislation. Lord Chelmsford immediately put himself in communication with Sir J. Shaw Lefevre, and he, in his turn, with the compilers, and the beginning of a most useful catalogue was fairly taken in hand.

There is no doubt that the want of such a work as we have before us has been long and seriously felt. This volume contains two

great divisions: (1.) A Table of all the Statutes arranged in order of date; and (2.) An Index to enactments in force.

The Chronological Table is framed with these objects:—“(1.) To show what Acts are not in force, and how the same have ceased to be in force (by express repeal or otherwise); (2.) With respect to Acts wholly or partly in force to give (column 2) the respective heads in the Index, under which the enactments in force (with other enactments on the same subject) will be found. (3.) With respect to Acts partly in force to give (column 3) any express partial repeals thereof; but not to give other operations on Acts wholly or partly in force,—as amendments, extensions, or perpetuations,—these being traceable by the Index.”

The compilation has been based on the edition known as the Statutes of the Realm, and extends from 20 Henry III., the Statute of Merton, to 32 & 33 Vict. c. 117. It has been prepared, under the direction of a committee, by Mr. Arthur John Wood, to whom the important task of preparing the Bills for expurgating the Statutes was confided, out of materials collected in that work; and we feel bound to add that, under that gentleman's able editorship, a most clear, concise, and useful register has been produced. Its general completeness is one of its main features. At intervals, for some years past, we have been presented by Parliament with a brace of cumbersome Blue Books, containing an Index of the Statutes, the last up to 1865, published in 1867, and embracing the Acts only which were repealed, or in part repealed, since the union in 1801. To this extent the method of arrangement in these volumes differed from the present work. There was no mention of Acts wholly unrepealed, an omission which is here supplied. But we must notice that the “subject matter” columns, in many instances, in the old editions, were more voluminous, and consequently more descriptive and explanatory. We may also add that, in the new volume, this “subject matter” has frequently been varied apparently to save space, and not always in our opinion with advantage. We may further remark that, although in the Appendix a list is given of popular names of Acts, it would have been much better if they had been inserted in the tables. Statutes, which are well known by distinct names, appear here under a summary of their subject matter, which makes them often difficult to recognise. Take, for example, the following:—“Arms; army; bail; commission; coronation; Crown; House of Commons (election); fines and forfeitures; loans; Parliament; petitions; punishments; taxes.” We venture to say, not many readers will be able to recognise this as the Bill of Rights. Or, again, to take another equally well known example; here is the Act of Settlement—“Charter; coronation; Crown; judges; pardon; Parliament.” Surely it would have been better to have given these the names by which every lawyer knows them.

“The Index,” says the preface, “is framed with the object of indicating generally the subject-matter of enactments in force, not of giving a detailed analysis of each Act. It is intended, not to



furnish an exhaustive summary of the Statute Law under each head, but to serve as a guide to a person desiring to find out the enactments bearing on a given subject." In this particular it is not so comprehensive as "Stamp's Index," though it extends far beyond the province of that work in taking cognisance of Acts relating to some parts of the United Kingdom and the Colonies, and of Acts relating to certain questions not of much public interest. Stamp, on the other hand, goes more into sectional detail. Beyond what we have already observed in the Parliamentary Index to the Statutes, there appears nothing new or novel in this portion of the volume to require further comment. This portion of the work has been compiled by Messrs. Jenkyns and Chute.

The Appendices are made up of various kinds of Acts, the contents of which it has not been thought desirable, for obvious reasons, to index in detail. These have been classified under certain headings, and relieve the Index proper of a large amount of superfluous matter.

The publication of the work appears to be based on the same footing as that of the Statutes at large, and the Queen's printers contract for their production subject to certain saving rights. It was originally suggested that the work, when once completed, might be corrected during the session and the edition for each year brought out at the conclusion of the session. This, no doubt, would have involved great expense, but it appears that the plan has been departed from, and that papers indicating the alterations and additions required after each session will in future be printed and published instead.

In conclusion, we have only to add that it gives us much pleasure to welcome this very useful book of reference, the production of which does so much credit to all concerned, and we most sincerely trust that the publication of the volumes of revised Statutes, to which it in one sense relates, will speedily follow.

**Practice of the Court of Referees on Private Bills in Parliament, with the report of cases as to the *Locus Standi* of Petitioners during the Sessions, 1867-8-9. By Frederick Clifford, of the Middle Temple, and Pembroke S. Stephens, of Lincoln's-Inn, Barristers-at-Law. London: Butterworths. 1870.**

This is one of the very easiest books that it was ever our lot to review. Easy, because nothing can be more disagreeable than to find fault, and nothing can be more agreeable than to praise. From our own experience of parliamentary practice, we can safely affirm that the present work supplies a want long felt, and perhaps our authors have made the first step ever yet made in the direction of uniformity and certainty of parliamentary decision.

We are glad to see that one of the authors, at all events, brings to the subject considerable practical information, and we, in discharge of our duty to the legal public, have only to say, that as we can find

no fault worthy of hostile comment, we can safely commend this *Hand-book of Practice* to the notice of all parliamentary practitioners.

*The Life of Rufus Choate.* By Samuel G. Brown, President of Hamilton College, Massachusetts. Second Edition. London: Sampson Low, Son, & Marston, 188, Fleet Street. 1870.

THIS book has considerable interest to an English lawyer. It is the life of an American lawyer. Rufus Choate was one of the average great lawyers of America, and perhaps the main interest of the book is derivable from the fact that his life may be taken as a type of those lived by the average great lawyers of America. He was in every sense of the word an American. His countenance, which is shown to us in an excellent engraving, may be taken as that of the typical Yankee of the best class. It is expressive of intense energy and restlessness. There is perhaps a little more grimness about it than usually belongs to the Yankee face, the grimness which is peculiarly characteristic of over-worked lawyers. His oratory is also distinctly American. It is more verbose than the best English oratory, and would be considered in England far too tinselly. But just as no one can deny that Macaulay's essay on Milton contains passages of beauty, so no reader of this biography will doubt that Choate occasionally gave utterance to genuine bursts of eloquence. Perhaps the most interesting portions of his life are the extracts from his diary. Here, however, and indeed elsewhere throughout the book, half the matter might well have been omitted. Here are a few points of interest from his diary in Europe. On his arrival in London in 1850, the trial of Pate for striking the Queen was going on. "Pate would have been acquitted in Massachusetts. The prisoner's counsel might have saved him. The chief judge (Alderson) offended me. He is quick, asks many questions, sought unfavourable replies, repeats what he puts down as the answer, abridged and inadequate. The whole trial smacked of a judiciary, whose members, bench and bar, expect promotion from the crown." (Did Mr. Choate know that so far as the bench was concerned, such promotion was impossible?) "Their doctrine of insanity is scandalous. Their treatment of medical evidence and of the information of that science scandalous." "Their voices (the judges' and counsels') are uncommonly pleasant; pronunciation odd, affected, yet impressing you as that of educated persons. Some, Mr. Humphrey, Mr. Cockburn, occasionally hesitated for a word. All narrated drily; not one has in the least impressed me by point, force, language, power: still less, eloquence or dignity. The wig is deadly."

On the other hand here are his impressions on the French bar:—"The Courts of law pleased me too. The judges in cloaks or robes of black, with capes,—quiet, thoughtful, and dignified; the advocate in a cloak and bare-headed, debating with animation and no want of dignity—the dress and manners far better than the

English bar. The silk gown or cloak is graceful and fit, and might well have been (it is too late now) among the costumes of our bar."

Mr. Choate's opinions on the ages of European buildings was a little indefinite. "Notre Dame is a majestic old church, 500 or a 1000 years old."

As a specimen of what we have said of his style of speaking, take the following:—

"I give you from the ladies of this Salem—the holy and beautiful city of peace—a banner of peace! Peace has her victories, however, as well as war. I give you then, I hope and believe, the banner of a victory of peace. The work of hands, some of which you doubtless have given away in marriage at the altar,—the work of hands for which many altars might contend! some of which have woven the more immortal web of thought and recorded speech, making the mind of Salem as renowned as its beauty;—the work of such hands, the gift of such moral sentiments, the symbol of so many sensibilities and so many hopes, you will prize more than if woven of the tints of a summer evening sunset inscribed and brought down to earth by viewless artists of the skies."

This is clearly the "high falutin" of an educated man. Occasionally, though not often, we get glimpses of fun and humour, always of the American type. Here for example is a specimen which is worth recording. A portion of the boundary line (in a case before him) was described in the agreement as follows, "Beginning," &c., &c. "Thence to an angle on the easterly side of Watuppa pond, thence across the said pond to the two rocks on the westerly side of the said pond and near thereto, then westerly to the button-wood tree in the village of Fall River," &c., &c. In his argument commenting on the boundary, Mr. Choate thus referred to this part of the description:—A "boundary line between two sovereign States, described by a couple of stones near a pond, and a button-wood sapling in the village. The commissioners [might as well have defined it as starting from a blue jay, thence to a swarm of bees in hiving time, and thence to five hundred foxes with fire-brands tied to their tails."

Mr. Choate never lost self-possession. He seemed to have the surest mastery of himself in the moment of greatest excitement. He was never beside himself with passion or anxiety, and seldom disconcerted by accident or unexpected posture of affairs, so very seldom indeed, that the one or two cases where he was slightly so, are pretty distinctly remembered. One instance occurred in the trial of a question of salvage. It was the case of the *Missouri*, an American vessel, stranded on the coast of Sumatra, with specie on board. The master of the stranded vessel, one Dixey, and Pitman, the master of the vessel that came to her aid, agreed together to embezzle the greater part of the specie, and pretend that they had been robbed of it by the Malays. Mr. Choate was cross-examining Dixey very closely, to get out of him the exact time and nature of the agreement. The witness said that Pitman proposed the scheme, and that he objected to it among other reasons as dangerous. To which he, said Pitman, made a suggestion intended to satisfy him. Mr. Choate insisted on knowing what that

suggestion was. The witness hesitated about giving it. Mr. Choate was peremptory, and the scene became interesting. "Well" said Dixey at last, "if you must know, he said that if any trouble came of it, we could have Rufus Choate to defend us, and he would get us out of it if we were caught with the money in our boots." It was several minutes before the court could go on with the business.

The book is worth reading, and conveys the impression of a patriotic earnest man—a sincere admirer of the institutions of his country and of the promise which America holds out for the future.

**A Treatise on the Bankruptcy Act, 1869,—the Debtors' Act, 1869, and Bankruptcy Repeal Act; with the Rules and Orders under those Acts, with an Introduction and Notes, and the Law of Private Arrangement with Creditors. By George Sills, M.A., Barrister-at-Law. London: Davis & Son. 1870.**

MR. SILLS is already favourably known as an author upon the subject of composition deeds, and we may therefore expect him to be at home with the subject which he has now chosen.

Inasmuch as the "rules and orders," form part of the volume, it may be regarded as complete, and in form and size, and in cheapness we may add, there is nothing to be desired.

The introduction very clearly and in a few words contrasts the new Act with former legislation, and the chapters on the Act of 1869, as regards bankruptcy liquidation by arrangement, composition with creditors, abolition of imprisonment for debt, and punishment of fraudulent debtors, are good, and the authorities are carefully collated.

We can recommend the volume to all classes of practitioners.

**Reports of the Decisions of the Judges for the Trial of Election Petitions, Pursuant to the Parliamentary Elections Act, 1868. Parts II. and III. By Edward Loughlin O'Malley, Esq., and Henry Harcastle, Esq., Barristers-at-Law. London: Stevens & Haynes. 1870.**

THE two remaining parts of this work have now made their appearance. The third part, which completes the book, contains the index, which was promised when the second part came out, at the end of last year. In our last August number, we made some comments which appeared to us warranted by the mode which the authors had adopted in treating their subject, and we think our criticisms upon Part I. still apply to the later parts of the volume.

We think, that our authors are fairly entitled to praise for the manner in which they have done their work, and that they may reasonably expect that the book will be found of utility, and thus be commercially a success, but we find fault with them because, with the means at their disposal, they have not made it more useful than it is. It is not exactly a volume of reports, nor in any shape or way is it a



treatise, but with a very little more trouble it could have been made to answer both purposes, either by the addition of notes, or at all events by means of references. One or two references are to be discovered, which should be cross references but are not, *vide* p. 72 (Staleybridge case), where there is a reference to p. 38, but no reference at p. 38 to p. 72.

It is an unpleasant task to find fault, but the index is not so complete or full as it should be. As one example of this, under head "election" is found "what intimidation avoids," and reference is only made to p. 72, and none at all to pp. 229 and 246; so under head "intimidation" we find "by rioting, what amount of, voids elections," and references to pp. 472 and 246, but none at all to p. 229 (Stafford case), perhaps the most important of all.

However much we regret to say even this in disparagement of our authors' work, we thought it right so to do, and have only now to add that whatever its blemishes may be, the book will be found useful, and when a general election comes, and as we may hope, for the sake of the profession, bearing with it a number of petitions, we have but little doubt that this volume will find its way into a great number of hands.

**King's College Lectures on Elocution ; being the Substance of the Introductory Course of Lectures and Practical Instruction in Public Reading and Speaking, annually delivered by Charles John Plumptre, Lecturer on Public Reading and Speaking, King's College, Evening Classes Department. Dedicated by permission to H.R.H. the Prince of Wales. London : Allman. 1870.**

THIS, although not a law book, is a book for lawyers. Practical treatises on various branches of the law may be essential to store the mind of the advocate with ideas ; but unless he has the power of expressing them in such a way as to command the attention of the Court, his learning will prove of but little avail. To a barrister the brains are of but small use without the tongue ; and even the tongue, however fluent, may fail to give due expression to the ideas, unless the voice is properly regulated so as to pronounce with both clearness and force the words that are uttered, and the gestures of the body enforce what the language has attempted to impress. Many are the failures of those who would otherwise have been successful advocates, from want of attention to the principles of elocution. Their matter has been excellent, but their manner has been so bad as entirely to destroy the effect that their address must otherwise have produced. We would point to instances of this kind in Parliament, at the Bar, and in the pulpit. To all such persons the work before us will be found invaluable ; and indeed there are few, if any, whose duties require them to speak in public, who will fail to derive advantage from its perusal. The subject is treated in a thoroughly practical manner, and is fully investigated with care and judgment. Mr. Plumptre speaks with the authority of a professor, and he

appears to understand his subject entirely, and in all its different branches. He is quite aware of all the difficulties to be encountered, and is ready with advice how to meet them. His work evinces considerable research, extensive classical and general knowledge, and is moreover full of interesting matter. We commend it heartily alike to those who aspire to become orators in Parliament, to the clergy, and to the Bar.

**A Code of English Law (Principles and Practice) for handy reference in a Solicitor's office. By Frederick Richard Syms, Solicitor. London : Stevens & Sons. 1870.**

THIS work is intended as a book of reference in the offices of practising solicitors. It is proposed to be published in four parts, of which two are now before us. The design of the author is good and the execution evinces many marks of care and sagacity. The principle of division of the subjects treated is calculated to present the matter of each head in an intelligible and useful shape.

One good effect the use of this manual would have, which is to call the attention of the practitioner to how many difficulties are involved in the definition and application of the general rules of law. It is the characteristic of those who enter upon the law without adequate training and practice to fancy that it is an easy matter to deal with the propositions of law couched in abstract terms, and to be unable to fully grasp the common effect of the combined action of a number of general rules. To know the exact limits of the operation of one rule and to perceive the restriction of one rule upon another or others, is a true mark of legal discipline. By presenting the whole field of a subject at a single view, a great help is provided in the direction of practical training.

The present work certainly affords assistance in regard of this object. Some of the chapters constitute a sort of synoptic view with reference to which practice may be conditioned and directed. In addition to formulating the rules of law and suggesting exceptions with regard to practical application, the work contains some useful forms.

On the whole, the work as an analysis, would direct general reading, while as an aid in practice it is adapted to suggest precautions and point to exceptions and contingencies which might otherwise escape notice, and so work mischief and injury when redress may become wholly or partially impossible.

**Letters on the Land Question of Ireland. By W. O'Connor Morris, the "Times Special Commissioner." London : Longmans & Co. 1870.**

ALL diligent readers of the *Times* newspaper, during the latter half of the year 1869, cannot fail to have observed a series of graphically worded and thoroughly able letters on the actual state of Ireland at the present epoch. These letters were so designed as to convey



very authentic and reliable information, not only as to the state of the northern portion of the island, but also as to the less-favoured and less understood condition of the southern and western provinces. These letters are now no longer anonymous and ephemeral. They are acknowledged and republished; and they form a volume which may claim to stand as the latest, and therefore the most valuable, exposition of those facts which form the basis of the great legislative land question. Mr. O'Connor Morris is a graduate of Oxford, a practised writer, an accomplished lawyer, and an acute and discriminating observer. He has the further qualification of personal and hereditary connection with Irish landlordism. With all these claims to attention on the part of its author, it would be strange if the volume before us did not contain much information of a highly valuable and thoroughly apposite kind. It is important to remark that any account of Ireland, unless written at a very recent date by a well-qualified hand, is now valueless. The changes in the material condition of the country are rapid; and the Ireland of to-day is widely different from the Ireland of fifteen or twenty years since. Mr. Morris gives to his readers the results of a very recent examination of the country; and the very least that can be said of his inquiries is this—they are far more valuable for all purposes than the reminiscences of senile land-agents, retired ex-magistrates and others, who describe, not without exaggeration, the Ireland of a former date in a manner which must be described as rather amusing than instructive. To all these, the book before us presents a contrast, inasmuch as it is not only stamped with highest authenticity, but presents a trustworthy picture of rural Ireland of the present day. If any fault or shortcoming must be noted it is one for which Mr. Morris can scarcely be blamed. Possibly too large a portion of his useful and well-written volume is occupied by details relating to a few large estates. These estates may be regarded as exceptional, and therefore as contributing little to a knowledge of the intricacies of this wide and deep discussion. It matters little to us that the estate of a Lord Derby, or a Mr. Pollock, or a Lord Portsmouth, should be managed in a particular way; for these are not fair average examples of Irish estates. We desire to be better informed concerning the crowd of less distinguished or less wealthy proprietors; and as to them and their goings-on, and their relations with their tenants, it is evidently far more difficult to gain a knowledge. Perhaps it might also be objected that Mr. Morris sometimes quotes Arthur Young (whose writings, after all, possess little more than a merely antiquarian interest), when our only wish is to learn the present condition of a district, and the present causes of disquietude amongst its inhabitants. But after making every allowance for these drawbacks, if such they be, we feel bound to acknowledge that Mr. Morris's volume, the result of very recent personal investigation by a highly competent inquirer, contains more information of a practical and valuable kind than any other of the numerous volumes, bound in green cloth, and dealing with cognate topics, which have issued from the press during the last twelve months or more. The closing

chapters contain the outline of a new branch of legislation for settling the vexed questions which spring out of Irish land, which it may be predicted, will coincide to a great degree with the laborious products of the Parliamentary session of 1870.

**English Law and Irish Tenure.** By Frederick W. Gibbs, C.B.  
London: Ridgway. 1870.

THIS is a pamphlet which may, with advantage, be studied by those who have little time or inclination to go more deeply into a very intricate question, and who resolve to keep clear of Blue Books and all other volumes which can throw more or less of light on the Irish land controversy. The author, Mr. Gibbs, does not lay claim to any special personal knowledge of the topic which he has chosen; and the pages of his pamphlet bear testimony to his indebtedness to many former writers. We may, perhaps, hazard a surmise that he has little actual knowledge of Ireland or of Irish property, and that he relies altogether on such authorities as appear to him competent and trustworthy. Such a writer as Mr. Gibbs is at an evident disadvantage; for he simply quotes from ex-Judge A or Doctor B, without any idea of the weight which those names ought to carry with them, and not suspecting that political bias, habitual contrariety of mind, or obliquity of mental vision may possibly deprive the quoted oracle of all positive value. This necessary inability to weigh and appreciate evidence must, to a certain extent, reduce the value of even such a well meaning, impartial, and generally meritorious publication as that of Mr. Gibbs. One of the points forcibly put forward in his valuable pamphlet is the comparative contempt into which agricultural customs have been suffered to fall in Ireland, in the eyes of legal magnates. Had men of the mental calibre of Lord Mansfield presided over the Irish Courts of Justice in times past, a beneficial *lex non scripta*, modifying and humanizing the relations between landlord and tenant, would have been recognized and enforced; and there would not have come to light, in our own day, several outrageous cases of confiscation on the landlord's part of valuable and costly improvements wrought, with his knowledge and assent, by an unsuspecting tenant. But Irish Law, as it has been administered, has never proved flexible enough to protect the tenant; who has, therefore, fallen into the way of protecting himself by irregular and unjustifiable methods. Mr. Gibbs explains at some length the peculiarity of that undefinable something called "Ulster Tenant Right," and, in short, has left untouched no important branch of the difficult inquiry on which, with many qualifications for his task, he has been induced to enter.

**The Evils of the Unlimited Liability for Accidents of Masters and Railway Companies; especially since Lord Campbell's Act.** By Joseph Brown, Q.C., F.G.S. Second Edition, Enlarged and Corrected. London: Butterworths. 1870.

Those who remember "The dark side of trial by jury" will regret,

we think that Mr. Brown has written the pamphlet now before us. Whatever the evils may be of "Unlimited Liability for Accidents," the case for the railway companies cannot, we think, be improved by being over-stated and exaggerated. Mr. Brown, in the course of his large and varied practice, no doubt has seen cases of hardship, and the view which one might reasonably expect a man such as Mr. Brown to entertain has been, as it were, warped to such an extent, that he really cannot see that there are two sides to every question, and that the present class of cases form no exception to this rule. Mr. Brown towards the end of the pamphlet says, "I have thus endeavoured to *claim* justice, *even* for railway companies." The words we print in italics show the *animus* with which he has written, and we think show clearly that Mr. Brown cannot expect us to regard his view as purely judicial. It is that of a *Nisi Prius* advocate, and that is all—of a man who, while desiring to relieve some persons from hardship, would inflict it on nearly all. The truth of the matter is that the principle, that a man or a company should make reparation for the injury he inflicts, is the true one. With this principle Mr. Brown is openly at conflict, and we fail to see that he proves that the principle is unsound. He attacks it because juries have been foolish, medical men, we might almost say corrupt, at all events ignorant, and persons, who have sustained injury, naturally angry. Further, Mr. Brown cannot be ignorant that new trials, when the damages given are excessive, are commonly granted, and the verdict of the jury very often is reduced *sub silentio*, under the *screw* of the rule for a new trial being applied for and obtained.

The Policy of the Contagious Diseases Acts, 1866-1869. Tested by the Principles of Ethical and Political Sciences. By Sheldon Amos, M.A., Barrister-at-Law, Professor of Jurisprudence, University College, London. London: Ridgway, 1870.

No subject that at present engages the attention of thoughtful men and women can for a moment compare with that upon which Mr. Amos has written. We think that in our whole history no subject matter has ever given rise to greater differences of opinion, and both sides of the question have been presented to the public mind with the greatest ability. It may be that as one result of a wider intelligence, of greater knowledge of foreign countries, and of the views entertained by other nations of the natural relations of the sexes, our own national views may be, if we may so express it, continentalized. Those who oppose most strenuously the extension of the operation of the Acts to the civil population, nevertheless are more or less content that some protective measure should exist with reference to our military and naval forces. Others again oppose any measure whatever of the kind, and action has been taken for the repeal of the existing Acts.

It appears to us (and our own opinion we express with diffidence, knowing how many other persons differ from us) that while the higher and better feelings of our nature are arrayed against any such Acts whatever, a real examination of the subject must lead any man to the conclusion that it is advisable something should be done in the interest of the State. The difficulty here arises, that "something advisable," leads, as some say, to the utter degradation of a large number of women, and what seems as bad, if not worse, to the undue protection of those who deserve no protection whatever, namely the weak, brutal, and vicious portion of men. Were this really so, we should adopt the view of Mr. Amos. But, the truth is, that those who are not weak, not brutal, not vicious, will be protected as well, and this view has been already advocated by a lady (Miss Garrett) in the *Pall Mall Gazette*.

The true difficulty is as to machinery and the practical working of the Acts, and we think the true course to adopt is not to extend the operation of the Acts at present. Let the Acts in force remain in force, and when experience has shown, if it can, that they can be worked without danger or degradation to the woman portion of the community, it would be time then to extend them to the population at large. Upon the purely medical view of the matter we say nothing, if medical science can do very little in detecting disease, *cadit questio*, the matter is at an end. But we certainly do not think that medical knowledge is so impotent, as some would have us think.

On the Forfeiture of Property by Married Women. By Arthur Hobhouse, Q.C. (Reprinted from the *Fortnightly Review*, for the Committee in support of Mr. Russell Gurney's Married Women's Property Bill.) Manchester : Ireland & Co. 1870.

MR. HOBHOUSE has written, as we might have expected, a very able pamphlet. It is from the women's rights' side of the question.

This question, one of the many that the present up-heaving of society has brought into the light of discussion, is one the importance of which can hardly be exaggerated. If it is to be hoped and expected that alteration in the law, so far as it relates to the holding of property by married women, will cure any of the conjugal evils, any of the domestic troubles that undoubtedly exist, let us hasten the day when an enabling Statute may be found in our Statute Book. For ourselves we think it will, and can heartily commend this *brochure* to the attention of our readers.

The American Law Review. April, 1870. Boston : Little & Co.

THIS number of our able American contemporary does not contain so great an amount of matter interesting to English readers as usual. It contains, however, well written articles on "Contributory negligence on the part of an Infant," and on "The Right of a Landlord to regain Possession by Force." The first collects a number of very



curious cases on the point whether negligence on the part of a parent or guardian in allowing the child to be exposed to an injury, will be a bar to an action brought against the third person who has caused it by his negligence. To enter into the question here is not our purpose, although the question is an interesting one. The American Law of Bankruptcy seems to be in as unsatisfactory a condition as our own, and the conclusion of the writer of the article on the right of a landlord to regain possession by force is that, in Massachusetts at least, restitution will not be given in any case where there is not title enough to maintain trespass; and a landlord may safely regain possession by force if he uses no more than is necessary, and will incur no more liability than to an action of trespass *quare clausum*, or for assault.

The Journal of Jurisprudence and Scottish Law Magazine. Edinburgh: J. and T. Clark. 1870.

THE numbers of this Journal for February, March, and April, contain the usual amount of legal lore and current information. The series of articles, numbering six, on the "Conflict of Laws administered by the Superior Courts of Great Britain," here come to a close. These articles, but with a more than proportionate leaning to the exposition of Scotch Law, were very creditably written, and contain a large amount of conflicting matter eminently serviceable both to the student and the practitioner. The other papers forming the parts were chiefly on the subject, in one way or other, of the Courts of Law and a Digest.

The Albany Law Journal. Albany, U.S. 1870.

WE have before us the numbers of this journal from the beginning of the present year. We are glad to welcome this transatlantic publication as one of very great promise. It is well printed on good paper, has plenty of legal information, and is well edited. One of its pleasantest features is that it contains a mixture of the purely legal with what we may venture to call the literary legal. It is a compound in other respects of one of our legal newspapers and a legal magazine. It is rare in legal newspapers to have such a variety of *readable* matter. Here, for example, are the titles of some of the lighter articles: "Law and Lawyers in Literature," a series of articles on which topic has gone on since the commencement; "On the Study of Forensic Eloquence," well written and interesting articles; "Bar Stories, Old and New," copied from *Cassell's Magazine*; "How Some Men have got on at the Bar;" "Methods and Objects of Bar Reading." The legal reporting seems carefully done, and, altogether, the journal is a credit to the legal profession of the United States, and will be found of interest in this country. It certainly ought to find a place in the libraries of our Inns of Court.

## Events of the Quarter, &c.

### LAW AMENDMENT SOCIETY.

AT the meeting of the Society, held on February 14th, a paper by Mr. Joseph Brown, Q.C., was read "On the Evils of Unlimited Liability of Masters and Railway Companies in case of Accidents, with an Argument for Limited Liability." Mr. Brown took objection to the operation of the law that the penalty fell upon persons who were not morally to blame. A man who had saved 10,000*l.* might set up a brougham and might be mulcted of his whole fortune by the carelessness of his servant in driving over a merchant making 2000*l.* a year. Under the criminal law the master was only liable either for his own acts or for those done by his orders. He held that the principle of the civil law in the matter was unjust, and therefore impolitic. Even on the ground of policy the liability should at any rate be limited. In the case of employers, it might be enacted that no action should be brought against a master without joining the servant as a co-defendant. Passing on to the question of railway accidents, Mr. Brown thought the companies ought to be entitled to charge on their tickets an insurance for a certain amount, and to promote insurances for larger amounts, and that the damages in cases of injury should be limited to 200*l.*, or perhaps 500 times the amount of the fare paid. This would be a fine sufficiently substantial to insure as much care as the present system called for. He further recommended that the amount of the damages should be assessed by some properly constituted and responsible tribunal, and should have power, if need be, to adjourn a case in order to ascertain if the injury were likely to be permanent. In the discussion which followed several speakers commented on the fact that there was a class who preyed on railway companies through the facilities offered by the law as it stands. An interesting discussion followed the reading of the paper.

At a meeting of the Society, on the 14th March, Baron Pigott in the chair, Mr. Joshua Williams, Q.C., read a paper "On the Real Estates Intestacy Bill." On the conclusion of the paper a discussion of some length took place. Baron Pigott said Mr. Williams's remarks were very comprehensive. He thought Mr. Williams was right in not desiring to interfere with the power of settlement and entail, except in the way of limiting them to two or three lives. With regard to intestacy, the question was, "Is the law at present just?" Public policy was not the consideration, but did the law act justly? He thought it would be more just to subdivide the property. It was well known that many men made no wills; some could not bring themselves to do so; some delayed from day to day, and died at last without having made one; while others were legally or, in fact,



incompetent to sign one. In all such cases the eldest son took the estate, brothers and sisters being left to want. The eldest son was, like many of us, fond of himself. He often fell into bad hands. It was impossible to say that a law providing for an equitable division of the property would be injurious. One of the protective clauses of such a measure should act in preventing too great a subdivision of land. It would not be desirable to have a tenant under a half dozen landlords. There was a provision in Mr. Locke King's Bill giving power to demand an apportionment of the land. If this power were to be unlimited, we might have an embarrassing number of small proprietors who would not be able to work the land properly. He thought that the system of allowing property to descend with a title was very well, but he could not see the advisability of parties not looking for distant heirs. In such a case what would have been done with the earldom estates in the Shrewsbury case? It would not do to encumber any measure with such provisions, for people would not give up their chances of a succession, however remote. He quite agreed with the paper so far as the alterations in the law of intestacy were concerned, but he thought care should be taken, and that land should not be indefinitely subdivided. He concluded by moving a vote of thanks to Mr. Williams, which was passed, and after a similar vote to the Chairman, the meeting adjourned.

#### CONFERENCE ON THE GAME LAWS.

A CONFERENCE of Farmers and Landowners of Warwickshire, Staffordshire, and other districts was held recently at Coventry in connection with the Warwickshire Chamber of Agriculture, and was attended by a large assembly of gentlemen. Mr. G. F. Muntz contended for an abrogation of the more stringent provisions of the present laws, and proposed to provide by legislation for an annual valuation by an independent officer and compensation to the tenant. Mr. Richards advocated the entire sweeping away of the game laws, and moved a resolution to that effect. Mr. P. Wykeham Martin, M.P., gave an outline of a Bill which he intended to introduce in the present session of Parliament for the reform of the game laws. He believed the time was come when rabbits should be dealt with differently from any other game. However *bonâ fide* the landlords acted, there was always a great soreness about this unfortunate animal. It was possible for landlords to return the tenant the whole of his rent, and yet the latter was not satisfied. Rabbits were a great nuisance to farmers, and they were the great inducement for poachers. He proposed—and he had the support of the leading Conservative members in so doing—to bring in a Bill by which the right to rabbits should be vested in the tenants absolutely, and by which the reservation of rights in favour of the landlord should be illegal. He also proposed that the duty on keeping rabbits should be abolished. He should be happy to have the name of Mr. Hardy to go first on the Bill. He did not propose to interfere with hares, pheasants, or partridges, because the evil in their case was not felt. Partridges were of great use to the farmer in destroy-

ing insects. Mr. Newdegate, M.P., sent a telegram regretting inability to attend the meeting. He had considered the proposal of Mr. Muntz for an annual valuation. It would be an arbitrary measure, and would lead to great inconvenience both to tenants and landlords. It would be simpler to declare that the game belonged to the tenant, all agreements to the contrary notwithstanding, but that would be unjust without power to alter the rent. The remedy that seemed possible to him was a specific contract between the landlord and the tenant without the intervention of a third party except by agreement. Mr. Bromley Davenport, M.P., said the great evil seemed to be the excessive preservation of game. But it would be a greater evil if a more stringent trespass law were passed and the game laws abolished. He would oppose legislation to prevent by compulsion special agreements between landlord and tenant. Let something be done by legislation that should have the effect of diminishing ground game, rabbits, and hares. A resolution was ultimately carried urging the exclusion of rabbits and hares from the game laws.

#### THE SUPREME COURT OF THE MAURITIUS.

A SELECT Committee of the Legislative Council on the Constitution of the Supreme Court of this island has just reported. The necessity of reforms in the organisation of the Supreme Court has arisen from causes inherent to the system adopted, and not from a want of integrity in the judges. Having reported at length on the whole subject, the Committee concluded with the following recommendations :—

“(1.) That every judge who shall be appointed hereafter be bound to retire on the completion of his sixty-fifth year.

“(2.) That the number of the judges of the Supreme Court be increased from three to four, and that the sittings now held by two judges be held hereafter by three judges.

“(3.) That every judge of the Supreme Court be bound to abstain from sitting when the attorney or advocate retained by either of the parties shall be his relative by blood or marriage in the direct line to all degrees, and in the collateral line to the third degree inclusively.

“(4.) That the master, or a district magistrate, or an advocate chosen by the Governor, be called to complete the Court when, for any cause, the titular judges shall not be able to form a quorum among themselves.

“The Committee are convinced that the reforms which will have for effect to strengthen the organisation of the Court, to protect the judges against unjust suspicions, and to place the members of the Bar on a more regular and equal footing with regard to litigants, will be new guarantees for justice, and will increase its prestige.”

One of the Committee dissented from the Report, and a memorial was presented against it by the Bar, and another is proposed to be presented against it to the Secretary of State for the Colonies.

## THE LATE CHAIRMAN OF THE SURREY SESSIONS.

A FULL attendance of the Surrey Sessions Bar at the Sessions House, Newington, attended on the 7th March, for the purpose of presenting an address to the late chairman, Sir Thomas Tilson, on his retirement from that office.

Mr. Lilley, the leader of the Bar, addressed Sir Thomas in eulogistic terms on his retirement as chairman, and read the resolution which had been passed by the Bar, which was as follows:—"That the members of the Surrey Sessions' Bar desire to express their deep regret at the retirement of Sir Thomas Tilson from the chairmanship of the Sessions, and at the same time to record their high estimation of his public character and private worth, and to assure him that he carries into his honourable retirement the hearty good wishes of all their number."

Sir Thomas Tilson, in reply, stated that this resolution of the Bar was only a continuance of the kindness which, since his first connection with the Sessions, he had always received from the Bar. It was true that he had had a professional experience of thirty-five years before he came there; but that experience having been exclusively confined to civil matters, he had felt a difficulty in accepting the offer of the chairmanship when made to him, but he was assured by his brother magistrates that the Bar of the Sessions was so kind and considerate that in all matters he might rely on their assistance. He had found that to be true to the very letter in the case of every member of it. It was impossible for any magistrate sitting in that place to receive greater kindness than he had experienced from the Bar. They had always acted towards him with the greatest consideration and courtesy; they had always respected the office, if not the man, though they had been good enough to say that the man, too, had earned their respect. Their expression of respect he greatly esteemed, for he believed there was nothing in this country superior to an enlightened and intelligent Bar; he therefore felt this compliment very much indeed. He feared that he had been eulogised far more than he deserved. In addition to the expression of their good opinion he had another source of consolation in his retirement, and that was that he left behind him as chairman one whose ability and courtesy so well fitted him to fill that position.

## THE RIGHT HON. EDWARD LITTON, M.C.

"THE death of the Right Hon. Edward Litton," says the *Irish Law Times*, "is felt by the legal profession as the loss of a personal friend, not merely of an eminent Judge. The remarkable demonstration of respect and affection at his funeral could have been called forth by no judicial ability, however distinguished, without those personal qualities by which Edward Litton was endeared to all who came in contact with him. His unfailing courtesy to all, and the kind encouragement which he used to hold out to the young and hesitating practitioner, will be long and gratefully remembered."

"Edward Litton was born in the year 1788, and had, therefore,

attained the ripe age of eighty-two years. He graduated in Trinity College, Dublin, where he was a distinguished member of the old Historical Society, in which he obtained several medals, and of which he was elected auditor in 1808. In 1811 he was called to the Bar, and rapidly acquired practice. He was appointed Queen's Counsel in 1830, and was for many years the leader of the North-west Circuit, from which he retired in 1833, confining himself thenceforward to his Chancery practice. On his retirement from the circuit his brethren presented him with an address and a gold snuff-box, and the attorneys who practised in the circuit, with an address and a handsome piece of plate. Thus early do we find traces of that remarkable and well-deserved personal popularity which followed him to the grave, after a long and active life. His Chancery practice was very extensive, and he is said to have realised the largest income of any Irish lawyer of modern times. His learning was extensive and profound, and his grasp of the principles of the law unerring. In 1837 he was returned to Parliament by the borough of Coleraine, which he continued to represent until, in 1842, he accepted the office of Master in Chancery. This office was so manifestly disproportionate to his professional position, that it was generally supposed to have been offered and accepted merely as a step to higher promotion. Edward Litton, however, remained Master in Chancery until his death. A tardy and inadequate recognition of his professional and political claims was his recent elevation to the rank of Privy Councillor. The gratitude of political parties is generally excited by a sense of favours yet to come, and more noisy and pressing claims had from time to time to be satisfied. Of the manner in which Master Litton discharged the important duties of his office we need not speak at present. A learned, painstaking, and upright judge; an honourable and courteous gentleman, and a warm friend, he has left a name behind him which will not soon be forgotten."

The Incorporated Law Society has passed a resolution, recommending that a subscription be set on foot for the purpose of raising a suitable memorial to his memory.

#### THE LATE JUDGE PAYNE.

The death of this much respected Judge took place at his house suddenly, on the 29th of March. He was preparing to leave home on his judicial duties, and, feeling ill, was seized with an attack which terminated fatally in a couple of hours. Sir William Bodkin and Mr. Serjeant Cox, each on the event becoming known, spoke from the Bench their regret at the loss the Court and the public had sustained.

Mr. Payne was a gentleman commoner of St. Edmund's Hall, Oxford. He was called to the Bar at Lincoln's-inn, in June, 1825, and afterwards migrated to the Middle Temple. He practised as a barrister for a long period, and was subsequently appointed Deputy-Assistant Judge of the Middlesex Sessions, which position he has held for several years past. He was in his seventy-third year.



**BAR EXAMINATIONS.***Trinity Term, 1870.***EXAMINATION ON THE SUBJECTS OF LECTURES AND CLASSES.**

THE Examination for Exhibitions on the subjects of Lectures and Classes delivered in the three Educational Terms 1869-70, will commence on Thursday, the 30th June, at Lincoln's-Inn Hall.

Students who propose offering themselves must enter their names on or before Wednesday, the 1st June next, at the Steward's Office, Lincoln's-Inn ; and a Reader's Certificate of having duly attended the Lectures and Classes on the subjects in which a Student offers himself for Examination, must be sent to the Council of Legal Education at Lincoln's-Inn, on or before Thursday, the 23rd June.

Students having duly attended the Lectures and Classes of one or more of the Readers from the Michaelmas Term preceding the July Examination, are qualified to enter for Examination on such subjects, but they are not allowed to enter for the Elementary and Advanced Examinations on the same subject, and provided that the Terms they have kept do not exceed the limits prescribed by Clause 40 of the Consolidated Regulations of the Inns of Court.

Students who have passed an Examination under the 45th Clause, are not eligible to enter for the July Examination under the 39th Clause of the Consolidated Regulations.

Students who have obtained Exhibitions under Clauses 42 and 43, are not eligible to enter again at a subsequent examination on the same subjects.

The Examinations for the Exhibitions will be partly oral and partly in writing, by means of Printed Papers of Questions.

The following Days and Hours have been set apart for the said Examination :—

Thursday Morning, June 30, from 10 to 1—Constitutional Law and Legal History.

Thursday Afternoon, June 30, from 2 to 5—Jurisprudence, Civil and International Law.

Friday Morning, July 1, from 10 to 1—On Equity.

Friday Afternoon, July 1, from 2 to 5—On the Common Law.

Saturday Morning, July 2, from 10 to 1—The Law of Real Property, and

Saturday Afternoon, July 2, from 2 to 5—A Paper composed of three Questions on each of the foregoing Subjects of Examinations.

**GENERAL EXAMINATION.**

AN examination will be held in next Trinity Term, to which a student of any of the Inns of Court, who is desirous of becoming a candidate for a studentship, an exhibition, or honours, or of obtaining a certificate of fitness for being called to the Bar, will be admissible.

Each student proposing to submit himself for examination, will be required to enter his name at the Treasurer's office of the Inn of Court to which he belongs, on or before Wednesday, the 18th May

next; and he will further be required to state in writing whether his object in offering himself for examination is to compete for a studentship, exhibition, or other honourable distinction, or whether he is merely desirous of obtaining a certificate preliminary to a call to the Bar.

The examination will commence on Wednesday, the 25th May next, and will be continued on the Thursday and Friday following, except as regards Hindu Law, &c., to be held on Saturday, the 28th May.

It will take place in the Hall of Lincoln's-inn; and the doors will be closed ten minutes after the time appointed for the commencement of the examination.

The examination by printed questions will be conducted in the following order:—

Wednesday morning, the 25th May, at ten, on Constitutional Law and Legal History; in the afternoon, at two, on Equity.

Thursday morning, the 26th May, at ten, on Common Law; in the afternoon, at two, on the Law of Real Property, &c.

Friday morning, the 27th May, at ten, on Jurisprudence and the Civil Law; in the afternoon, at two, a paper will be given to the students, including questions bearing upon all the foregoing subjects of examination.

Saturday morning, the 28th May, at ten, on Hindu and Mahomedan Law, and on the laws in force in British India; in the afternoon, at two, a paper upon the foregoing subjects of Hindu Law, &c.

The oral examination will be conducted in the same order, during the same hours, and on the same subjects, as those already marked out for the examination by printed questions, except that on the afternoons of Friday and Saturday there will be no oral examination.

## **CALLS TO THE BAR.**

*Hilary Term, 1870.*

LINCOLN'S INN.—In addition to the lists published in our last number, the under-mentioned gentlemen were called to the Bar by the Hon. Society of Lincoln's Inn on Wednesday the 26th of January, viz.:—Mr. John Clifford Hopkinson, B.A., Cambridge; Mr. Edward Codrington William Grey, Oxford; Mr. George Barrington Baker, B.A., Oxford; Mr. Francis Gould, LL.B., Cambridge; Mr. Thomas Henry Briggs, B.A., Oxford; Mr. William Venn Drummond; Mr. William Coleman Watson, B.A., Dublin; Mr. William Edward Mirehouse, B.A., Cambridge; and Mr. Edward Beaumont, B.A., Cambridge.

## **EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.**

*Hilary Term, 1870.*

At the final examination of candidates for admission on the roll of



attorneys and solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Thomas Dewhurst Lingard, Lionel Barned Mozley, Augustus Beddall, Thomas Stockwood, jun., Oswald Walmesley.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Lingard, the prize of the Honourable Society of Clifford's-inn. To Mr. Mozley, the prize of the Honourable Society of Clement's-inn. To Mr. Beddall, Mr. Stockwood, and Mr. Walmesley, prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, under the age of 26, passed examinations which entitle them to commendation:—Harry Campbell Blaker, Joseph Bennett Clarke, Robert McTurk, William John Mann, Walter Sherburne Prideaux.

The Council have accordingly awarded them certificates of merit.

The examiners further announced to the following candidate that his answers to the questions at the examination were highly satisfactory, and would have entitled him to a certificate of merit if he had not been above the age of 26:—George John Vanderpump.

The number of candidates examined in this term was 114; of these, 99 passed, and 16 were postponed.

### APPOINTMENTS.

THE Queen has been pleased to direct letters patent to be passed under the Great Seal, granting the dignity of a knight of the United Kingdom of Great Britain and Ireland unto John Lucie Smith, Esq., C.M.G., Chief Justice of the Island of Jamaica, to Robert Hodgson, Esq., Chief Justice of the Island of Prince Edward, and to Michael Roberts Westropp, Esq., Chief Justice of Her Majesty's High Court of Judicature at Bombay.

Mr. George Young, the Lord Advocate has been appointed Queen's Counsel.

Mr. J. A. Russell, Q.C., Judge of the Manchester County Court, has been appointed a Magistrate for the County of Lancaster. Mr. W. H. Cooke, Q.C., Judge of the Norfolk County Courts, Magistrate for the County of Norfolk.

Mr. Henry Clark has been appointed Recorder of Tiverton, in succession to the late Mr. Richard Roope. Mr. John J. H. Saint, Recorder of Newark, in the place of Mr. Bristowe, M.P., and Mr. Serjeant Cox, Deputy Assistant-Judge of Middlesex, in the place of Mr. Joseph Payne, deceased.

Mr. C. W. Lovesy has been appointed Stipendiary Magistrate of Sheffield. Mr. J. C. Fowler, Stipendiary Magistrate of Merthyr and Aberdare, to the Deputy Chairmanship of the Glamorganshire Quarter Sessions.

Mr. James Bryce, Barrister-at-Law, has been appointed Regius Professor of Civil Law in the University of Oxford, in succession to Sir Travers Twiss, resigned.

Mr. Frederick J. Fegen, R.N., Barrister-at-Law, has been appointed Naval Counsel to His Royal Highness the Duke of Edinburgh, K.G. Mr. W. R. Malcolm, Barrister, has been appointed to the Assistant-Secretaryship of the Railway Department of the Board of Trade, vacant by the appointment of Mr. R. G. W. Herbert to be Assistant Under-Secretary at the Colonial Office, in the place of Mr. Ralph Lingen, C.B. Mr. H. Thurston Holland, Barrister-at-Law, to the Assistant Under-Secretaryship of State, at the Colonial Office, and Mr. F. D. Longe, Barrister-of-Law, to a Poor Law Inspectorship for six months during the absence from ill-health of Dr. Markham.

Mr. William Chater, Solicitor of Lowestoft, has been appointed by the Board of Inland Revenue, Distributor of Stamps for the Lowestoft District, in the room of Mr. R. Morris, deceased. Mr. Augustus Keppel Stephenson, Assistant-Solicitor to the Treasury, temporarily to perform the duties of Registrar of Friendly Societies, pending the decision of Parliament upon the measure affecting that office, which has been introduced by the Chancellor of the Exchequer. Mr. J. Elliott Fox, to the office of Solicitor of the Customs Fund. And Mr. Rose Fuller, of the Principal Registry of Her Majesty's Court of Probate, London, to the District Registrarship for Newcastle-on-Tyne, in succession to Mr. M. S. Jobbling, deceased.

Mr. Walter Hyde, Solicitor, of Stockport, has been appointed Town Clerk of that borough, in succession to Mr. Henry Coppock, deceased, and Mr. Thomas Lewis, Solicitor, to the Town Clerkship of Tunbridge Wells.

Mr. E. Reddish, LL.B., Solicitor of Stockport, has been elected Clerk to the Magistrates of that borough, in the room of the late Mr. Henry Coppock; and Mr. W. S. Banks, Solicitor of Wakefield, Clerk to the Magistrates of that borough, which has just received a separate Commission of the Peace. Mr. William Fowle, Solicitor of Northallerton, Yorkshire, has been appointed Clerk to the Local Board of Health, Clerk to the Commissioners, and Clerk to the Northallerton Board of Guardians, in succession to the late Mr. Thomas Fowle; and Mr. William Lisle, Solicitor, Clerk to the Durham Board of Guardians, in succession to the late Mr. Richard Thompson. Mr. J. Blacklock Lee, Solicitor, has been appointed Registrar of the County Court at Haltwhistle, Northumberland, and also Clerk to the Highway Board; and Mr. J. W. Sangster, Solicitor of Leeds, Registrar of the Pontefract County Court, in the place of Mr. Henry J. Coleman, resigned. Mr. John Burder, Solicitor of Manchester, has been appointed Legal Secretary to the Right Rev. James Fraser, Bishop of Manchester.

Mr. P. O. H. Reed, Solicitor of Bridgewater, Somersetshire, has been appointed Coroner for that Borough, in the room of Mr. J. Poole, deceased; Mr. James Broughton Edge, Solicitor, Coroner for Bolton; and Mr. Weedon, Solicitor, Coroner for East Berkshire.

Mr. J. Wybergh, jun., Solicitor of Liverpool, has been reappointed Solicitor to the Borough Magistrates, in appeal cases, at a salary of 200*l.* per annum.

**IRELAND.**—Mr. Serjeant Dowse has been appointed Solicitor-General for Ireland; and Mr. David Sherlock, Q.C., M.P., Third Serjeant-at-Law, in the room of Mr. Dowse.

**SCOTLAND.**—Mr. Adam Gifford, Advocate, has been appointed one of the Judges of the Court of Session of Edinburgh, as Lord Gifford, in the room of the late Lord Manor; and Mr. Donald Makenzie, Advocate, a Lord of Session, in succession to the late Lord Barcaple.

Mr. Stair Andrew Agnew, Advocate, has been appointed to the office of Queen's Remembrancer for Scotland, in room of the late Mr. John Henderson. Mr. A. C. Sellar, Advocate (1862), has been appointed Secretary to the Lord Advocate, in room of Mr. Agnew. Mr. W. C. Spens, Advocate, has been appointed Sheriff-Substitute at Hamilton, in room of Mr. James Veitch, resigned.

**INDIA.**—Mr. F. D. Chauntrell, Solicitor, of Bombay, has been appointed Government Solicitor at Calcutta.

**BRITISH COLUMBIA.**—Mr. Henry Pering Pellew Crease has been appointed a Puisne Judge for the colony of British Columbia.

Mr. George Phillippo has been appointed Attorney-General for the colony of British Columbia, in succession to Mr. H. P. P. Crease.

**BRITISH GUIANA.**—Mr. J. T. Grivert, Barrister-at-Law, has been appointed Attorney-General of the colony of British Guiana, in succession to the Hon. J. S. Smith, C.M.G.

**INDIA.**—Sir Richard Couch has been appointed Chief-Justice of the High Court of Judicature at Fort William, in Bengal; Sir Michael Roberts Westropp, Chief-Justice of the High Court of Judicature at Bombay, and Mr. James Kerman, Q.C., Puisne Judge of the High Court of Judicature at Madras.

Sir J. Couch, Chief-Justice of Bombay, has been promoted to the Chief-Justiceship at Calcutta, vacated by the retirement of Sir Barnes Peacock.

Mr. H. S. Cunningham, M.A., Barrister-at-Law, has been appointed by the Government of India to officiate as a Judge of the Chief Court of the Punjab during the absence of Mr. C. Bouluvis.

Mr. L. P. D. Broughton, Barrister-at-Law, has been appointed Registrar of the Archdeaconry of Calcutta, from the 1st of January.

Mr. Joseph Graham, Standing Counsel to the Government of India, has been appointed to officiate as Advocate-General at Calcutta, during the absence of Mr. T. H. Cowie.

Mr. G. C. Paul, Barrister-at-Law, of Calcutta, has been appointed to officiate as Standing Counsel to the Government, vice Mr. J. Graham.

Mr. Theodore Thomas, Barrister-at-Law, has been appointed Professor of Law at Canning College, Lucknow.

Mr. H. M. Plowden, Barrister-at-Law, has been appointed to officiate as Advocate and Legal Adviser to the Government of the Punjab during the absence of Mr. Cunningham.

**ISLAND OF TRINIDAD.**—Mr. Joseph Needham, one of the Judges of the Supreme Court of British Columbia, has been appointed Chief-Justice of the Island of Trinidad in the West Indies, which

office has been vacant since the death of the Hon. W. G. Knox.

NEW SOUTH WALES.—Mr. J. E. Salomons, Barrister-at-Law, has been appointed Solicitor-General of the Colony of New South Wales.

## *Neurology.*

### *January.*

20th. THRUPP, John, Esq., Solicitor, aged 52.

20th. ROOPE, Richard, Esq., Barrister-at-Law, aged 50.

23rd. NORRIS, William, Esq., Solicitor, aged 53.

24th. EVERETT, Edward, Esq., Barrister-at-Law, aged 71.

24th. BADHAM, Richard, Esq., Solicitor, aged 79.

25th. BAKEWELL, William, Esq., Crown Solicitor of South Australia, aged 52.

25th. BUTLER, E. Robert, Esq., Solicitor.

26th. DENISON, Edward, Esq., M.P., Barrister-at-Law, aged 28.

27th. ROBERTS, Hon. William, Justice of the High Court, Allabanad, N.W.P. India.

27th. MAYSON, J. W., Esq., Solicitor.

28th. COLLINS, Francis, Esq., Solicitor, aged 28.

30th. LACE, Ambrose, Esq., Solicitor, aged 77.

### *February.*

1st. BECKINGTON, Charles, Esq., Solicitor, aged 54.

4th. MELLERSH, Thomas, Esq., Solicitor, aged 87.

6th. GAINSFORD, Robert J., Esq., Solicitor, aged 64.

10th. RABY, W. P. P., Esq., Solicitor, aged 30.

12th. SHEBBEARE, Charles J., Esq., Barrister-at-Law, aged 75.

12th. TAYLOR, Charles, Esq., Solicitor, aged 55.

15th. BEAVAN, Edward, Esq., Barrister-at-Law, aged 56.

19th. JOBBLING, M. Lambert, Esq., Solicitor, aged 76.

21st. JONES, Charles J., Esq., Solicitor, aged 73.

22nd. RONNALES, Anthony, Esq., Solicitor, aged 43.

- 22nd. HARRIS, Langley H., Esq., Solicitor.  
 23rd. BARCAPLE, Lord, Judge of the Scotch Court of Session,  
 aged 62.  
 23rd. FINCH, George, Esq., Solicitor, aged 42.  
 27th. MENTEATH, Sir James S., Bart., Barrister-at-Law, aged 78.

*March.*

- 4th. LENNARD, C. B., Esq., Barrister-at-Law, aged 74.  
 5th. PRUJEAN, Francis, Esq., Barrister-at-Law.  
 7th. GRADY, John, Esq., Barrister-at-Law, aged 72.  
 10th. INGLESANT, Joseph, Esq., Barrister-at-Law.  
 11th. CORBET, J. Fletcher, Esq., Solicitor.  
 16th. HOGG, C. Swinton, Esq., Barrister-at-Law, aged 46.  
 16th. DIXON, H. H., Esq., Barrister-at-Law, aged 47.  
 16th. BOCKETT, D. S., Esq., Solicitor, aged 72.  
 17th. DARBY, J. G. N., Esq., Barrister-at-Law, aged 40.  
 18th. ROWDEN, E. W., Esq., D.C.L., Registrar of the University of  
 Oxford.  
 19th. HERRIES, H. Crompton, Esq., Barrister-at-Law, aged 43.  
 20th. COTHER, William, Esq., Barrister-at-Law, aged 57.  
 23rd. EVANS, Alfred, Esq., Solicitor, aged 38.  
 26th. COPPOCK, Henry, Esq., Solicitor, aged 64.  
 28th. WACE, C. Richard, Esq., Solicitor.  
 29th. GRAVES, J. Thomas, Esq., Barrister-at-Law, aged 54.  
 29th. PAYNE, Joseph, Esq., Deputy-Assistant Judge of Middlesex  
 Sessions, aged 72.  
 31st. PHILLIPS, JOHN, Esq., Solicitor, aged 68.

*April.*

- 4th. WALLER, Robert, Esq., Solicitor, aged 47.  
 4th. JESSEL, Henry, Esq., Barrister-at-Law, aged 48.  
 7th. THEOBALD, William, Esq., late Clerk of the High Court of  
 Calcutta, aged 71.  
 7th. POWLES, J. Endel, Esq., Solicitor, aged 58.  
 9th. WISE, Frederiek J., Esq., Solicitor, aged 57.  
 9th. WHALL, Robert, Esq., Solicitor, aged 54.  
 11th. EVANS, Samuel, Esq., Solicitor, aged 62.  
 16th. STEELE, Adam R., Esq., Barrister-at-Law, aged 53.



THE  
**Law Magazine and Law Review :**  
OR  
QUARTERLY JOURNAL OF JURISPRUDENCE.

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No. LVIII.

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ART. I.—NOTES ON THE CODES OF INDIA.

By T. L. MURRAY BROWNE.

THE following observations have no pretensions to rank as an essay. Still less do they profess to contain an adequate examination and discussion of the subject with which they deal. They are simply, as their title implies, mere notes. Inadequate as they are, the writer nevertheless ventures to think, that they may be of service to those who lack time to study the subject for themselves.

The Indian Codes, as at present existing, are in number four, viz., the Penal Code, the completed portion of the Civil Code, the Code of Civil Procedure, and the Code of Criminal Procedure. Of these the Codes of Procedure are probably neither the best nor the most important. The subject with which they deal is, however, peculiarly interesting at the present moment, when a revolution, embodied in the Lord Chancellor's High Court of Justice Bills, is impending over the legal system of this country. We will therefore commence with the Codes of Procedure.

The Indian Code of Civil Procedure (Indian Acts, 1859, VIII.) was prepared in this country by the Indian Law Commission. As originally introduced in 1859, it applied



only to the inferior Courts, and not to the Supreme Courts of Calcutta, &c., a circumstance which may account for some of its peculiarities. In 1862, however, a revolution was effected in the Indian Courts, similar to that which is now hanging over our own heads. In that year, the Indian Courts of Common Law and Equity were fused, and at the same time the Code of Civil Procedure, as then in force in the inferior Courts, was summarily introduced into every Court in India. Thenceforward it has regulated the practice and pleadings of that country—supplemented, however (and it is well to remember this), by the rules of the several High Courts.

The history of the modern Indian practice—and it is an instructive one—appears to be this.\* In putting forth the Code of Civil Procedure, the Indian Commissioners apparently intended to abolish pleadings altogether, and imagined that they had done so. Nevertheless, either from the innate perversity of legal practitioners, or because pleadings are by a law of nature inseparable from law suits, the benevolent intentions of the Commissioners have been frustrated, and pleadings continue to be in constant use in India. Nor would it be possible, in our opinion, under any system of procedure to dispense with pleadings altogether. The history of the Indian procedure furnishes a striking proof of the truth of this assertion. Inasmuch, therefore, as the original system of the Indian Code of Procedure has been materially modified in practice, it will be convenient first to explain the scheme of the Code itself, and afterwards to advert to the actual practice of the Indian Courts at the present time. We confine our remarks throughout to the Superior Courts of the different presidencies.

The scheme of the Code as distinct from its practical work-

\* A valuable account of the Indian practice (to which we are much indebted) is to be found in the evidence of J. D. Bell, Esq., and of R. V. Doyne, Esq., before the Scottish Law Commission, printed in the Appendix to the Second Report of that body.

ing is this. The suit commences with what is called a *plaint*. This is a very short document, containing the briefest possible outline of the plaintiff's case. The *plaint* is handed by counsel, or the solicitor conducting the case, to the judge, who runs his eye over it, and if he sees it is sufficient, directs it to be filed. The *plaint* is then verified, either positively or on information and belief, and is served on the defendant. So far, the main peculiarity of the Code consists in the inspection of the *plaint* by the judge *before* service on the defendant. The advantage of this inspection is not easily to be perceived. The next step in the cause is one which is peculiar to the Indian Code. This is termed the *first hearing* of the cause, and is purely preliminary. The parties appear before the judge, accompanied by witnesses, if necessary, and the judge, after hearing the parties, proceeds to settle *issues*. These *issues* are either of law, or of fact. Lastly, the cause comes on again for the second and final hearing, upon the trial of the *issues* previously settled. The parties then go into evidence, and the cause is decided.

The above is the scheme of the Code, but it is not made compulsory in all cases. And the litigants, availing themselves of the loophole thus left to them, have nearly succeeded in throwing overboard the scheme of the Code altogether. The course pursued in practice as distinct from that indicated by the Code is somewhat as follows. The presentation of the *plaint* in the first instance, and the perusal of it by the judge (the advantage of which perusal is not obvious) is preserved. The *plaint* being allowed, and served on the defendant, the next step is for both parties to prepare and file what are called *written statements*. These, whether proceeding from the plaintiff or the defendant, are described as being like "an exceedingly well drawn Bill in Chancery," omitting the charging part. The peculiarity of the Indian procedure is that the *statements* on both sides are filed simultaneously, without either party seeing his opponent's pleadings. Thus the defendant cannot

shape his case to meet that of the plaintiff, but must tell his own story of the transactions in question, in the same manner as the plaintiff. No written interrogatories are filed, as in Chancery, but the defendant knows the general nature of the plaintiff's case from the plaint; and with that knowledge he draws his own pleadings. It is not compulsory upon either side to file a written statement, but in practice it appears to be almost universal. *All* pleadings are verified upon oath in the same manner as the plaint. There is therefore nothing corresponding to a Bill in Chancery, or a declaration at Common Law, *i.e.* a statement, the exact accuracy of which is not vouched. So much for the pleadings. The *first* hearing of the cause for the purpose of the settlement of issues by the judge is clearly contemplated by the Code, but is almost invariably omitted in practice. The usual course is, that the parties agree upon issues, and then go at once into evidence. If they cannot agree upon issues, the case must go before the judge for the purpose of settling the issues, but in the Superior Courts this is rare. In fact the settlement of issues, as we are informed, has become in most cases a mere form. If, upon the actual trial, some question arises which is not included in the issues, the Court will direct a fresh issue to be added upon the spot, and if necessary will adjourn the hearing of the case in order to prevent a surprise upon either party.

The Code of Procedure appears to have contained no provision for interlocutory applications—a singular omission. This want has, however, been supplied by the practice of the Courts; and interlocutory applications, though not mentioned in the Code, are of constant occurrence.

The evidence at the (final) hearing is taken *viva voce* in Court; upon interlocutory applications the evidence is by affidavit. A similar practice prevails in both respects under the New York Code of Procedure (see *ante* No. LIV., August, 1869, p. 318). The report of the English Judicature Commission contains recommendations to the same effect.

Causes are heard in the first instance before a single judge ; but the Appeal Court invariably consists of several members. This again resembles the practice in use in New York, and that recommended by the Judicature Commission.

There is no provision in the Indian Procedure under which a defendant can be examined upon written interrogatories *before* the hearing. Thus there are no means of obtaining such discovery, as is afforded by the practice of the Court of Chancery in respect of answers. This is complained of in some quarters as a serious defect in the Indian Code. A similar defect exists in the New York Code of Procedure ; and in our own County Court practice in Equity. The report of the Judicature Commission contains no allusion to this point.

The working of the new Indian Procedure appears on the whole to have given satisfaction. The testimonies in its favour are not excessively enthusiastic, and it has probably some considerable defects. There has been a good deal of litigation about some of its provisions, and conflicting decisions have been given in some cases.\* Still it is described as an undoubted improvement upon the English Procedure. The circumstances of India are in many respects peculiar ; and on the whole we think that the Judicature Commissioners have exercised a wise discretion in declining to take the Indian Code as a model for the proposed new procedure of this country. Had they done so, the change so proposed would have been much greater, and more violent than any which is likely to occur at present.

We have now done with the Code of Civil Procedure.

The *Code of Criminal Procedure* requires little notice. It does not apply to criminal proceedings in the High Courts of the different presidencies. In these, trials are held before

\* For instances of cases decided upon sections of the Code, see amongst others *Maharani of Burdwan v. Srimati Baradasundari Debi*, 1 Beng. Law Rep., F.B. 45 ; *Amiruddin v. Jiban Bibi*, 1 Beng. Law Rep., F.B., 101 ; *Calvin v. Mrs. Barbara Elias*, 2 Beng. L.R., 216 ; *Rani Sarat Sundari Debi v. Surja Kant Acharji Chowdhry*, 2 Beng. L.R., App., 53.

a judge and jury, in the same manner as in England; with this exception only, that the substantive law by which the prisoner is tried (as distinct from the procedure and practice) is the Indian Penal Code; and not the Common Law and criminal Statutes of this country. The Code of Criminal Procedure applies only to the Mofussil, or Country Courts, beyond the jurisdiction of the High Courts. The Code itself is a compilation of rules for the guidance of magistrates, rather than anything else. It appears to be inferior in point of workmanship to the Code of Civil Procedure; \* and has lately been largely amended (by Act VIII. of 1869).

We pass on to the *Penal Code of India* (Act XLV. of the Indian Statutes of 1860). This Code was drawn up many years ago by an Indian Commission, of which Lord Macaulay was a principal member. Though completed in 1837, a long period elapsed before any sanction was conferred upon it by the Indian Government. At length, however, it was taken up by the present Indian Law Commission; and, with some alterations, became law. This was in 1860. Since that time it has constituted the penal law of India; and has therefore been tried by the test of actual practice during a considerable number of years. By all accounts it has worked admirably, and must be considered a great success. It is universally admitted to be a model of scientific arrangement, precision, and lucidity; while it is respected by the practical lawyer for its efficiency in practice. We believe that only one serious difficulty of construction has as yet occurred. This related to the proof required in cases of adultery (a crime in India). It need hardly be said that it is impossible to predict with confidence the success of a Code till we have experience of its actual working. The Penal Code of India has been subjected to this test, and has stood the trial. In this respect it possesses an advantage

\* Comp. ss. 44, 193 (and see Sched.), 411. See also Prinsep. Code of Crim. Procedure, pp. 13, 19, 219, 260 (ed. 2).



over the Penal and Civil Codes of New York\* which have not yet passed into law, but remain mere unauthoritative documents.

The Penal Code of India is confined to Penal Law. It does not touch the subject of procedure, upon which we have already commented. It is to be observed that the Code in question is exhaustive. For all practical purposes there is no Penal Law in British India, whether by Statute or usage, except the Code (see s. 2). This is in our opinion right. But it is by no means an universal characteristic of Codes.

The Illustrations which are generally appended to the sections next require notice. These constitute a distinctive feature in the present Code. Their character will best be understood by an example.

"§ 307. Whoever does any act with such intention or knowledge, and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished," &c.

*"Illustrations.*

"(a.) A shoots at Z with intention to kill him under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

"(c.) A intending to murder Z buys a gun and loads it. A has not yet committed the offence defined in this section. A fires the gun at Z. He has committed the offence defined in this section.

The object of the Illustrations will appear from the following extract from Messrs. Morgan & Macpherson's edition of the Code, p. 13.

"To unite conciseness with simplicity in definitions intended to include large classes of things, and to exclude others very similar to many of those which are included, will often be utterly impossible. The best course under such circumstances appears

\* As to these see our previous numbers for Nov., 1869 (p. 1), and for May, 1870, p. 1.



to be that which the framers of this Code adopted; that is, to draw the text of the law in abstract and concise language, and to give at the same time an authoritative commentary on the text in the shape of Illustrations. If a definition be followed by a collection of cases falling under it, and of cases which, though at first they appear to fall under it, do not really fall under it, the definition and the reasons which led to the adoption of it will be readily understood.

“Doubts must arise in practice respecting the interpretation of the most skilfully drawn laws. After a time such doubts in the interpretation of laws drawn in the usual mode are removed by decisions of the Courts on cases brought before them, and the meaning of the Legislature is reached. The Illustrations of the Code are cases decided by the Legislature contemporaneously with the enactment of the law, and they are authentic declarations of the scope and purpose of the law.

“The function of the Illustrations is, as their name indicates, to illustrate. They are not intended to supply any omission in the written law, or to put a strain on it. They make nothing law which would not be law without them. They illustrate the law, and as they do this with full legislative authority, they have all the force of law; but the whole law so illustrated by them must be considered to be contained in the definitions and enacting clauses of the Code.”

We understand, in accordance with the spirit of the above observations, that should an Illustration be found by mischance to be inconsistent with the proposition of the Code upon which it is based, the Illustration will be void. Should the Illustration go beyond the text, it will, *pro tanto*, fail.\* The Illustration explains, but cannot contradict or add to, the text of the Code. It must, at the same time, be remembered that the Illustrations have themselves the force of Acts of the Legislature. They cannot, therefore, except in the case of such a discrepancy as above mentioned, be disputed or denied. They constitute, in fact, a legislative interpretation of the text.

\* Comp. Illustration (a) to s. 508, the only instance which we have discovered of a discrepancy between the Code and the Illustrations.

The Illustrations appear to us one of the most valuable features of the Penal Code. We rejoice to see that, as will be shown hereafter, the Civil Code of India follows the Penal Code in this respect.

The following is a specimen of the provisions of the Code. It forms the commencement of the division concerning homicide. Attention may be called to the mode in which the subject is treated in the Code. The offence of culpable homicide is first defined, and the general offence is then divided into the several heads of murder, manslaughter, &c.

“§ 299.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

*“ Illustrations.*

“(a.) A lays sticks and turf over a pit with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm treads on it, falls in, and is killed. A has committed the offence of culpable homicide.

“(b.) A knows Z to be behind a bush. B does not know it. A intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide.

“(c.) A, by shooting at a fowl with intent to kill and steal it, kills B who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or cause death by doing an act he knew was likely to cause death.

“*Explanation 1.*—A person who causes bodily injury to another, who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

“*Explanation 2.*—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have

caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

“*Explanation 3.*—The causing of the death of a child in the mother’s womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed, or been completely born.

“§ 300.—Except in the cases hereafter excepted culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death ; or—

“ (2ndly.) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or—

“ (3rdly.) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or—

“ (4thly.) If the person committing the act knows that it is so imminently dangerous, that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

Want of space compels us to omit the very valuable Illustrations appended to this section.

We pass on to the *Civil Code of India*. This is now in course of construction under the auspices of the present Indian Law Commission of this country. One portion only is complete, and has passed into law. This is the portion treating of the subject of succession. It forms the Indian Succession Act, 1865 (Act X. of 1865), sometimes called the Indian Succession Code. Another great division of the Civil Code, namely, that of Contracts, has been drafted, and is now under consideration.

We cannot refrain from expressing our admiration of the Indian Succession Act, as a model of scientific workmanship. It is lucid, concise, and well-arranged, and far superior in point of workmanship to any Code with which we are

acquainted, excepting, perhaps, its companion, the Penal Code of India. It is an honour to this country that two such Codes should have been constructed by Englishmen.

The Indian Succession Act is comprised in 332 sections. To these are to be added the Illustrations which are appended to the sections. The nature of these Illustrations we have already described. They are similar to those employed in the Indian Penal Code. The dimensions of the Succession Act will appear of the most moderate character, when the vast range of subjects comprised within the Act is considered. It embraces, in the first place, all the ordinary topics which will at once suggest themselves to the mind in connection with the subject of succession to the property of a deceased person. And it should be remembered that the Act extends alike to the case of testacy as of intestacy. In addition to these the Act deals exhaustively with the following among other subjects—domicil—the entire law of wills, including a series of rules for the construction of wills—the doctrine of election—*donatio mortis causa*—probate and administration, including a complete Code of Practice for the Courts of Probate—and guardianship.

The Succession Act has been in force in India, as we have said, since 1865. Unhappily its operation is in practice very limited. Hindus, Mussulmen, Buddhists, and Parsees, are expressly excluded from its provisions. The number of Europeans resident in India is indeed considerable, but the vast majority of these are not domiciled there, and do not, therefore, come within the scope of the Act. It should be remembered, however, that the Act regulates the succession to all *landed* property in India belonging to Europeans, whatever the domicil of the owner of such land may be.

The Act is based upon the law of England, which has been followed throughout by the Commissioners, except in cases where they have in their judgment seen some distinct reason for deviating from it. In general, therefore, the law, as contained in the Succession Act, is identical with English

law, but on certain points it differs. In the latter class of cases the Commissioners have followed their own judgment in the new law which they have laid down, and, in general, where they have altered the law they have undoubtedly amended it.

In many cases changes which are now under discussion in this country have already been effected in India by the Act now under consideration. Thus, the principle of the Married Women's Property Bill, now before Parliament, has been both anticipated and exceeded in India. The Indian Succession Act enacts as follows:—

“§ 4. No person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her property, which he or she could have done if not married.”

This section only applies to marriages solemnised after the passing of the Act. In such cases, however, it far exceeds the provisions of the Married Women's Property Bill. So sweeping an alteration must necessarily modify to a considerable extent other branches of the law, besides that immediately affected. The section above cited ought therefore to have been accompanied by full provisions upon all points connected with the subject. We think the Act a little fails in this respect; and can imagine many questions arising as to the position of a wife under the new law, which should have been, but are not, provided for by the Act. It will be observed that the above section sweeps away both dower and curtesy. Subsequent sections of the Act preserve untouched the existing right of a widow to a distributive share in the property of her deceased husband who may have died intestate. With regard to the position of a husband surviving his wife, it is provided that he shall be entitled to the same share in his wife's property, if she have died intestate, to which under our law a wife is entitled in the undispensed of property of her deceased intestate husband.



Of the other changes in the law effected by the Succession Act, the following are the principal. The distinction between real and personal property is abolished. The law of land is assimilated to that of personal property, and the executor or administrator of a deceased person is made his real, as well as personal, representative, with full powers over the lands of the deceased. The entire doctrine as to advancements to children operating as an ademption of legacies; &c., is abolished; as is also the kindred rule, that a legacy to a creditor is *pro tanto* a satisfaction of the debt (ss. 163-6). The powers of testators have been curtailed on several points. The liberty of creating estates tail, and making settlements by will, is limited. So also is the power of making charitable bequests, where the testator has near relations (s. 105). The rule of perpetuity is altered (s. 101), and the principle of the Thellusson Act is carried further, by the prohibition of an accumulation of income for a longer period than one year from the death of the testator (s. 104). The complicated and difficult rules of our law as to bequests upon condition have been greatly simplified (ss. 113 *et seq.*). So also the law as to the administration of assets has been simplified, and put on a much more satisfactory footing (ss. 279 *et seq.*). For instance, the power possessed by an English executor of retaining his own debt, to the detriment of others, and of preferring one creditor to another, is abolished. Other minor changes are not mentioned here.

As a specimen of the language, &c., of the Succession Act we may cite s. 100, together with at least one of the appended Illustrations. The section relates to a point already alluded to, *i.e.*, the restrictions imposed by the new law upon the power of testators to effect family settlements of their property.

“§ 100. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the



whole of the remaining interest of the testator in the thing bequeathed."

*"Illustrations.*

"(a.) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void."

## ART. II.—PERSONAL EQUITIES AS OPERATING ON INDEFEASIBLE TITLES.

VERY recently the flagrant injustice which may be worked by Parliamentary conveyances (that is, such conveyances as confer an indefeasible title) has been brought prominently forward in Ireland by the decision of the Court of Appeal in *Tottenham's estate*.\* There is reason to believe that such mistakes as occurred in that case are not at all infrequent, and as the violent changes which are threatened in so many branches of our law render it probable that some measure for conferring such titles may be introduced even into this country, it is conceived that it must be highly useful to discuss the doctrine which is to be found floating through our books respecting PERSONAL EQUITIES, with the view of considering whether if applied in such cases as *Tottenham's estate*, it might not lead to a redress of the injustice there committed; not that it is conceived that any redress could be had if the form of proceeding already adopted were adhered to, nor that even if a Bill were filed the Court of Appeal would alter the

\* 3 Irish Reports, Equity, p. 528.

opinion it has already expressed; but that if a Bill were filed, the House of Lords would feel bound—in case the line of argument which we have indicated were adopted—to reverse the decision of the Court below. Some time since it became the duty of the writer on being consulted in a case somewhat similar to that of *Tottenham's estate*, to advise that his client, against whom a Landed-Estates-Court-conveyance was attempted to be set up, had a good ground for filing a Bill. The case was afterwards settled, the other side yielding their unjust claims. In the present article it is proposed, after stating the cases, to consider, first, whether the claim made in each is of a kind which the Statute intended to bar. Secondly, whether, if so, the Statute may not be evaded by means of the doctrine of personal equities; and thirdly, how far the section relative to the evidentiary effect of the conveyance affects the question.

In that case M held a farm on lease, and was indebted to N on a judgment. The latter turned his judgment into a judgment-mortgage, pursuant\* to the law which prevails in Ireland, and then obtained a decree from the Landed Estates Court that the lease should be sold to satisfy the judgment. He (N) also obtained leave to bid at the sale—a permission which the Landed Estates Court has power to grant and does usually grant—and he was in fact the only bidder at the sale, and bought the estate at a price much under its value. He was enabled to do this by the fact that the debtor and his friends abstained from bidding at the sale, which they would have done, had it not been for representations made to them by the creditor of his intention to hold the property merely as a security for his demand, and to reconvey as soon as that should have been

\* This is a peculiarity of Irish law. The judgment is no lien, nor charge on the land, but if an *affidavit* of the judgment, specifying that the creditor wishes it to affect certain lands, the property of the judgment debtor, be filed in the registry of deeds office, such filing has the effect of a mortgage of the debtor's interest in the lands to the creditor, and thus gives the latter power to sell in the Landed Estates Court.

satisfied. These were not representations of a mere floating intention in the mind, but of that which he would certainly do. They were made deliberately and frequently, long before, as well as immediately before the sale, when the debtor could have had the property bought in at a much higher price than the creditor paid for it, and with the intention of inducing him not to bid, or with the knowledge that it would have that effect. This case raised two questions. (1.) Whether the representation was in itself binding, independently of the Landed Estates Court Act. (2.) Whether, if so, that Act deprived the party of remedy. On the first question, the writer's opinion was, that it was binding, but upon this point he will enlarge no further here, because it is immaterial to the subject of this article. The similarity between *Tottenham's estate* and the case alluded to has reference only to the second of the above questions. We shall better discuss it after stating the facts of *Tottenham's estate*.

There an estate was sold in lots in the Landed Estates Court. One lot was purchased by Mrs. Reilly. She, at the time of the sale, was in occupation of that lot as tenant from year to year, and was, therefore, well acquainted with its boundaries. The rental (*i.e.*, the particulars) correctly stated the contents of the lot, and was in other respects accurate. After the sale was over the conveyance was prepared. The description of the property which it contained was framed in a manner which, in England, is universally condemned by conveyancers, *viz.*, by purporting to include simply such property as was, in a map on the margin, coloured red. It is not uncommon to insert a map on the margin of a deed, but where this is done in well drawn deeds a clause is subjoined, stating that in case of difference between the map and the written description, the latter shall prevail. Not only was this omitted in the present instance, but the written description, if any there were, was made subordinate to the map. Of course the map was erroneous. The part

therein coloured red included a piece of land which belonged to an adjoining proprietor. This proprietor had no opportunity of protecting himself because, although the Act requires notices to be served on adjoining proprietors, which had been duly done, yet these notices were all correct, and did not include the land in question. The mistake was made in this way. Under the practice of the Court it was the duty of the purchaser, by her solicitor, to have the conveyance drafted with a map attached thereto, and to submit it to the officers of the Court for their approval, and procure it to be executed by a judge. In discharge of this duty the purchaser's solicitor took the engrossment and map to the Ordnance Survey Office that the map might be transcribed on the engrossment. Mark what happened! The map was transcribed by a public officer who had no interest in the matter. The adjoining proprietor had not it in his power to peruse the engrossment. The public officer made a mistake in the boundary line and included part of the lands of the neighbouring proprietor. Such mistakes (the writer is informed on good authority) are frequent, and public attention ought to be called to the fact, for it is seriously proposed that the conveyancing of this country should be conducted by means of registration with Parliamentary titles. The purchaser was, at the time of the conveyance, ignorant of the mistake, but long afterwards she was, as one of the appellate judges expressed it, "informed of her *rights*" and therefore proceeded to enter upon the land which, by mistake, had been conveyed to her. The adjoining proprietor brought against her an action of trespass which was decided in her favour, on the ground that by force of the Landed Estates Court Act the land, which was included by mistake, had become vested in her. This decision has been impugned by a writer in the *Solicitors' Journal*, but the present writer confesses he does not see how it could have been different. Afterwards, on behalf of the adjoining proprietor, a motion was made in the Landed Estates Court that Mrs. Reilly might be directed to bring her conveyance

into Court in order that it might be rectified. This motion was granted, and Mrs. Reilly appealed. The Court of Appeal reversed the decision on the motion, on the ground that when once the conveyance had been executed the judge of the Landed Estates Court was *functus officio*, and had no power to interfere further between the parties. So far the writer does not question the soundness of their decision. But the question whether, on a bill being filed, a Court of Equity could grant relief is a wholly different one. It was not before the Court at the time, but the appellate judges (no doubt with the laudable intention of putting a stop to what they considered hopeless litigation) stated what their decision would have been if sitting in Equity, with their reasons. They thought that the indefeasible character which the Act confers on conveyances from the Landed Estates Court would have precluded them from giving any relief except, perhaps, in case of fraud—under which term they apparently included wilful fraud only, and not negligence—and that no such fraud as would entitle a party to relief had been committed in this case. It is here the writer feels compelled respectfully to question the decision of the Court, and this brings us to the essential part of our discussion.

Now observe the points of analogy between these two cases. In each there is a preliminary question, viz., whether, if the conveyance had been merely an ordinary conveyance from one landowner to another, there would have been a remedy in Equity? In the Anonymous Case the writer's opinion was that, if not on the ground of fraud, yet on the ground of contract, the representation of intention constituted a sufficient ground for relief by way of specific performance, and that the execution of the conveyance on faith of the representation was a sufficient\* part performance to take the

\* This seems to follow from the doctrine that parol evidence is admissible to prove that a deed absolute on the face of it was intended as a security for money. In such cases there is a parol agreement to reconvey on part payment. Of this the execution of the deed is a part performance.



case out of the Statute of Frauds. In *Tottenham's Estate*, the writer cannot help thinking that the negligence of the purchaser's solicitor in not seeing that the map was correctly coloured was an unjust disregard of the interests of the other party, and, therefore, amounted to fraud, and that this fraud, having been committed by the purchaser's agent, was chargeable on the purchaser herself, notwithstanding the decision in *Udell v. Atherton*,\* and that the Court might, therefore, have rectified the deed on the ground of fraud. On this point, however, the writer does not express any decided opinion. The question is very complicated and would require an essay for itself. But whether relief might have been granted on the ground of fraud or not, it might have been granted on the ground of mistake. In both cases, therefore, the preliminary question—could Equity grant relief if there were no indefeasible title?—must be answered in the affirmative. The remaining question in both cases is—Is the Landed Estates Court conveyance a bar to that relief?

The Landed Estates Act contains distinct provisions for the sale of a fee simple and that of a lease. In the Anonymous Case the subject of sale was a lease; in *Tottenham's Estate* it was the fee.

As to a fee simple it enacts † that a conveyance from the Court shall be effectual to pass the fee simple, subject to such charges, &c., “as may be expressed or referred to therein, but, save as aforesaid and as hereinafter provided, discharged from all former and other estates, rights, titles, charges, and incumbrances.” As regards a leasehold, that the conveyance shall pass the estate created by the lease, so far as unexpired, subject to the rent and covenants, but “*save as aforesaid and as hereinafter provided*,” discharged from all *rights, titles, charges, and incumbrances affecting the leasehold estate*. The words “*save as aforesaid*” in this section must mean “*save as regards the charges, &c., referred*

\* 7 H. & N., 172.

† 21 & 22 Vict. c. 72, s. 61.



to, and the rent and covenants provided for by the earlier part of s. 61," for there is nothing else they can refer to so far as regards the present question, unless s. 37 be considered applicable. The words "and as hereinafter provided," must have reference to s. 62, which provides that the conveyance shall not affect certain charges made by virtue of St. 5 & 6 Vict. c. 89, and 10 & 11. Vict. c. 32, except as therein mentioned.

We may, therefore, treat the section as if these words had been left out, and the question then amounts to this. Does the section (omitting these words) prohibit a Court of Equity in case of contract, fraud, or mistake, from granting relief against that very person who has made the contract, or committed the fraud or mistake; and if it does not prohibit the granting of every kind of relief, does it prohibit the granting of that kind which consists in directing the re-conveyance of the land which forms the subject of controversy? And this is resolvable into these questions. (1st.) Is a claim of this nature a right title, charge, or incumbrance within the meaning of the Statute? (2nd.) Assuming that it is, is it necessarily a right affecting *the land*, or may it not be viewed as a right affecting the person only, which Equity will recognize as affecting him only, and will enforce against him either by compelling him personally to re-convey the land—or, if he has already alienated it, or the Court finds it impossible, or considers it undesirable, to compel a re-conveyance, then by decreeing either the conveyance of other land of equal value, or the payment of a pecuniary compensation? The writer thinks both these questions may be answered favourably to the injured claimant. He is quite aware that the doctrine propounded in the second question will seem to some readers a startling one, but he can only ask them to suspend their judgment till they shall have perused the arguments he will advance in its support.

*First.* As to the meaning of the words "right," "title," "charge," and "incumbrance." The Act is of the nature of a

Penal Statute, and should, therefore, be construed strictly. It contains no recitals by which its policy can be discovered, but, if we may infer this from internal evidence (and no other can be admitted), we conceive it could only have been to make the conveyance of the Court a good root of title, and thus exonerate the purchaser from going any further back than the conveyance in his investigation of the liabilities which others had attached to the land, and not at all to exonerate him from the ordinary legal consequences of any obligation which he himself personally may have incurred. A Court, unless it violates the usual principles of construction, must interpret the words we have quoted in their narrowest sense, not their widest. Now, *as to a "Right."* It is true, Coke says,\* a "right in general signification includeth not only a right for which a writ of right doth lie, but also any title or claim, either by force of a condition, mortmain, or the like for the which no action is given by law, but only an entry," and this is quoted in Toml. Law Dict. *s. voc.* Now, taking this to be the true definition of the word, it does not extend to rights against the person, though they may draw with them as an incident a right to have the land. The right which a man has, by virtue of a mortgage, if Coke means the right of the mortgagee, amounts to this, that he has the estate in him, and, therefore, may enter by virtue of his estate. And if (as we conceive) he means the Common Law right of the mortgagor in a mortgage made (as mortgages in Coke's time were) simply by way of condition, this right is merely a title to re-enter in case he pays the money on the day, and is, therefore, a right directly *in rem*. And Coke himself takes such a distinction in his reports, where it is laid down that if the conusee of a Statute or recognizance (who corresponds to the judgment creditor, not judgment mortgagee, of the present

\* Co. Litt. 265 a.

† The passage between parentheses has reference to the law in Ireland (the opinion having been given in an Irish case), where the *elegit* and equitable charge are abolished, and the judgment creditor has no *ius in re*, but may by filing an affidavit acquire the position of a mortgagee.

day) release all his right *to the land*, he may, nevertheless, sue out execution against the land, because a personal right, though it may enable him to obtain the land, is not itself a right *to the land*. But, in truth, the above definition of "right" is not a correct definition of its strict sense. Coke, in giving it, was commenting on a precedent of a release of right, and he meant to state its *most extensive* (which is, probably, what he meant by "general") signification, because in a release its most extensive meaning would be given to it. It is clear on authority that the natural meaning of the word is the *mere ownership* of the land, or that portion of the ownership which remains in the owner after the land itself has been taken possession of by an *adverse* claimant. In Plowden,\* there is a discussion as to the meaning of this word, and the doctrine there is quoted with approval in Coke's † reports. A man had made a lease for life, with condition to have fee. The lessor was attainted of high treason by Act of Parliament, and his estates forfeited, but the Statute contained a saving of the "*rights*" of strangers, and one question was whether the title to have fee upon performance of the condition was a right within the wording of the Statute. Plowden's note is that, right is a general word, and must be largely understood, and is of six kinds. (1.) Right of recovering. (2.) Right of entering. (3.) Right of having. (4.) Right of retaining. (5.) Right of receiving. (6.) Right of possession; and in a saving of the rights of innocent third persons, the word may be understood to include all these rights and many others, *because* to take away such a right is contrary to reason and justice, *for which cause* every reasonable man will extend it to save everything which one has, or may have, in or out of the land. The reason which Plowden gives for construing the word largely in this Statute should equally induce a narrow construction of it in the Landed Estates Act, but taking it in all the six senses it only extends to rights *in re*, for the right of recovering no

\* 10 Co. 47 b. ; 487 a.

† 8 Co. 151 b.

doubt means a right to recover in a real action, in which case the party must have had a right in the sense in which we have defined the word. Its strict interpretation is thus given—"Right, that is where A has got possession of a thing which was wrongfully taken from B, or by disseisin, ejectment, and the like; this claim which B has to the thing is termed a right."

That the definition we have given of a right is correct is proved by two modern\* cases, which decide that the † enactment that a *right* of entry may be alienated does not extend to a *title* of entry for condition broken.

A *Title* is defined to be ‡ where a man has a lawful cause to have a thing which another has, and which the former has no [real] action to recover, as a title of entry for mortmain, or for breach of condition. And it was said that the possibility which the lessee in the case last alluded to had of acquiring the fee by performance of the condition was not a title. This definition seems to have been laid down by the minority of the Court in delivering judgment. Tomlinson defines it to be "when a man has lawful cause to enter into lands whereof another is seised."

A *charge* has been defined as "a thing done that bindeth him that doth it, or that which is his to the performance thereof," and accordingly it is said that a judgment before the modern Acts was a charge on land. But the meaning of the word has certainly much altered since this definition was written. It now means an incumbrance on the lands as distinguished from a claim against the person. This seems proved by Sugden, on Vendors,§ and by Fisher on Mortgages.

*Incumbrance* is defined by the Landed Estates Act itself in a way which excludes such a claim as we have been discussing.

\* *Hunt v. Bishop*, 8 Ex., 657. *Hunt v. Remnant*, 9 Ex., 635.

† 8 & 9 Vict. c. 10.

‡ Plowd., 483 a.

§ Sugd., V.P., 411, pl. 29. Fish., Mort., 2nd Ed., 435, lines 8-9.

It appears, then, that on ordinary principles of construction the words in question do not include such a claim as we are considering. If it had been intended to include anything more than what falls strictly within the meaning of these unusual words "right, title, charge, and incumbrance" it is reasonable to suppose that the draughtsman would have made use of the common form used in deeds which lay ready to his hand, and would have exactly suited his purpose. "Every estate, right, title, interest, claim, and demand, whether at law or in equity, in, to, or concerning the premises."

*Secondly.*—Even if the claim in question does fall within the words right, title, charge, or incumbrance, the writer thinks it is not a right affecting the land, but one affecting the person. When a man makes a contract, or commits a fraud or mistake, he becomes personally liable to afford redress to the other party. It may be that by his contract he purports to affect, or even to entirely alienate his land, or it may be that the rules of Equity in consequence of his contract, fraud, or mistake, transfer to the other party an interest in his land, but this does not relieve him from his personal responsibility. True it is that the injured party must choose which remedy he will have, the personal or the real, but he *may* prefer the personal, and the destruction of the real remedy does not disentitle him to the personal. Now, the Landed Estates Act has taken away the real remedy, but it does not purport to impare the personal. The personal remedy therefore is still in force. If a man agrees to sell me land, and he afterwards procures a declaration of his title to that land to be made by the Landed Estates Court, or if a man by fraud procures my land to be conveyed to him by that Court he is still liable, notwithstanding the Landed Estates Act, to pay me pecuniary damages, which I may recover by action in the Common Law Courts.

Now, there are some cases in which the Common Law



does not afford any remedy. The writer has, after great consideration and a perusal of all the relative cases, come to the conclusion that an agreement may be wanting in some of the essential attributes of a contract, and yet if partly performed may be enforceable in Equity, but of course he is aware that this proposition is open to much dispute. But it appears from a comparison of the Common Law and Equity cases that such a representation, as occurred in the Anonymous Case with which we started, would in Equity have been binding as a contract, but would at law have been void on the ground that the consideration, though within the contemplation of the parties, consisted only of an act done on the faith of the contract, but was not agreed upon by way of bargain. And in *Tottenham's estate*, even if the negligence there committed was not sufficient to support an action for deceit, still it might entitle the party to an equitable remedy, and if it were insufficient to entitle him to any remedy on the ground of fraud, still he might be entitled to relief on the ground of mistake—a ground on which he could have no remedy at law. Whether on the whole the injured party in each case would be entitled to a remedy is a question which, as he has already said, would require a separate discussion, but he believes and assumes that he would. Now it seems to be a principle of Equity (though one but imperfectly recognized) that *wherever any person is entitled to a remedy on principles of natural jurisprudence, but the Common Law gives him none, Equity will give him one, even though the only remedy properly applicable to his case be pecuniary damages or compensation.* If this be so it seems to follow that where Equity recognises the right, and gives a real remedy against the lands, &c., and a special Statute takes away that real remedy without expressly prohibiting any remedy whatever, and the case is one in which the Common Law gives no remedy, Equity will give a personal remedy in damages or otherwise. In the cases under consideration, the writer thinks that Common Law gives no remedy, and that Equity



would give a real remedy but for the Statute, and he assumes for argument's sake that the Statute has taken away the real remedy. Therefore, a personal remedy remains if the above imperfectly recognised principle can be proved to exist in Equity. Let us attempt the proof.

It seems to be sometimes thought that there is something in the nature of Equity antagonistic to the idea of relief by giving pecuniary damages. As applied to that kind of damages in which the feelings of the injured party must be taken into consideration, this is no doubt true, because perhaps no two men would form the same estimate of the compensation due to injured feelings, and hence the only way to obtain an approximately correct decision is to strike an average between the opinions of several different men, or in other words, to try the case by a jury. But wherever the damages are matter of calculation, a Court of Equity is competent to deal with the case. If, indeed, a satisfactory remedy can be obtained at law, Equity should refuse to interfere, because it is a suppletory jurisdiction. But wherever three circumstances concur—(1.) That on principles of general jurisprudence a remedy should be given; (2.) The Common Law refuses it; (3.) The damages are matter of calculation—Equity should interfere. And Equity does interfere. In the well known cases in which Equity gives compensation for deficiencies in the quality and quantity of estates agreed to be sold, this doctrine is exemplified. Other cases go much further in the same direction. In a recent\* case a partner having died who had paid a premium, the return of part of it was ordered, and precedents were adduced to the same effect, and on the death or bankruptcy of masters of apprentices the same jurisdiction was long exercised, by directing a return † of a proportionate part of the apprentice-

\* *Athwood v. Maule*, Law Rep., Ch. Ap., 369.

† *Hirst v. Tolson*, 2 MoN. & G., 134. *Hale v. Webb*, 2 Bro. O.C., 78. *Newton v. Rowse*, 1 Vern., 480. *Sandby*, 1 Atk., 149. *Barwell v. Ward*, 1 Atk., 260. *Webb v. England*, 7 Jur., N.S., 153, &c.

ship fee. In these cases the Court did in effect give to the injured party pecuniary damages for the nonperformance by the other party of his part of the contract, which his death, bankruptcy, &c., rendered him unable to perform. It is borne out by *Curey v. Stafford*, cited below, and indeed it flows directly from the maxim that Equity will not suffer a right to be without a remedy, for in some cases the only remedy applicable is a personal one.

But we go further. We maintain that not only does the removal of the real remedy cause a personal remedy to spring up, but that the land itself may be indirectly reached by means of that personal remedy, provided it still continues to belong to the defaulting party, or (according to the better opinion) to his representatives. We admit that when once he has alienated it beneficially, even to a volunteer, with actual notice, the only remedy which remains is to compel the guilty party to give a compensation in money, or by conveyance of other lands of equal value, but so long as the lands to which the plaintiff has a moral right remain in the other party's ownership, so long we contend the Court will, or at least may in its discretion, compel him to reconvey them.

In ancient times a use was regarded as a mere personal confidence, so much so that at first a purchaser from the feoffee to uses, or even it is said his heir, could not be compelled to execute it, nor could a corporation, because it had no soul, and therefore could not be guilty of a breach of faith. But since the passing of the Statute of Uses, the doctrines of Equity have much changed. Trusts have come in place of uses, but they are not the same. They are regarded\* as the land itself, or rather as an estate in it. But Courts of Equity while thus moulding their doctrines in regard to equitable estates into conformity with the Common Law, seem to have retained the ancient mode of viewing the subject in regard to a class of rights which a great writer (Spence) describes as those in which the

\* Lewin on Trusts, Introd.

legal estate has not been, by way of trust, conveyed to the party in whom it is vested, but has been acquired or is retained against conscience and equity. In these cases, as the same writer adds, the claimant seeks to enforce an equitable right, not to secure an equitable estate. And although when Equity proceeds upon this principle, it may enforce these rights against purchasers with notice, if there be no obstacle in the way, yet the principle admits of the remedy being enforced against the person, even though it is impossible to enforce it against a purchaser. Such an obstacle occurs, it would seem, in the following cases only—(1.) Where no specific subject, or no specific part of the subject, is affected by the equity; (2.) Where some rule of positive law prohibits the Court from affecting the subject of property itself.

The existence of equities of this nature is acknowledged by the following cases—

A female† infant being a ward of Court married. She was entitled to an estate in Demerara. A settlement of this estate was made by the direction of the Court, but the settlement was void by the law of Demerara. The husband and wife mortgaged the estate to a person who had full notice of the settlement. It was held that the mortgagee was not bound by the settlement, because it was void, but the Master of the Rolls expressed an opinion that the “contract of the husband” bound his person, though it did not bind the estate, and the Court would have made him give an equivalent. He put the following case:—Suppose the husband had been the owner of two estates, and had made a settlement of one, but afterwards his title to it had turned out to be bad, and the true owner had evicted the trustees, the husband would have been compellable to settle the other estate, or so much of it as might be sufficient to compensate for the evicted estate. But this

† *Martin v. Martin*, 2 R. & M., 507.

equity would, until Bill filed, have been personal only, and would not have affected the lands.

A was\* in possession of a copyhold estate, of which he believed himself to be owner. He agreed to sell it. Before the conveyance it turned out that the estate really belonged to an ancestor of his who was still alive. Afterwards, before any conveyance, the ancestor died, and the estate descended to A. Afterwards A died, and the purchaser brought a bill for specific performance against his heir. The bill was dismissed on the ground of *surprise*, but the Court expressed an opinion that the contract thus made while the vendor had no estate, did not bind any estate he may afterwards acquire, even in the hands of his heir, *but does bind himself personally*. The *dictum* to the effect that the heir is not bound has been disapproved of by Lord St. LEONARDS.† And, if the writer may presume to say so on good grounds, a personal contract binds no specific personal estate, but it does bind the party who breaks it to pay damages, and it certainly in general binds the executor to the extent of the assets. By parity of reasoning the heir should be bound by the liability in question, though merely personal. This does not at all involve the principle that a purchaser, although voluntary and without notice, would be affected.

S procured‡ a deed to be prepared, whereby lands were purported to be leased at nominal rent, with covenant by the lessor for quiet enjoyment. He afterwards filled in his own name as grantor and that of his servant C as grantee, and (it is to be presumed) executed the deed. He also gave the deed to C. It turned out that there were no such lands, and C brought a bill for conveyance of other lands of equal value. It was held that as no estate passed, the covenant for quiet enjoyment was void at law, because it was annexed to the estate—that consequently no relief could

\* *Morse v. Faulkner*, 3 Swan., 429 n., 1 Ans. 11.

† In *Averall v. Wade*, Ll. & G. t. Sugd., 252.

‡ *Carey v. Stafford*, 3 Swan, 427, n.

be had at law by action on the covenant—that therefore relief must be had in Equity. And it was decreed that lands of equal value should be conveyed for the same estate, and an account of rents and profits from the date of the deed as if such lands had really been conveyed by it. The decision would *à fortiori* have been the same if the contract had been made for valuable consideration. And the case would then have been as strong an authority on the point we cite it on, as it is under the actual circumstances. Subsequent cases make it doubtful whether Equity would now grant relief where valuable consideration is absent, but this does not affect *our* position.

In another\* case, Lord Cranworth, V.C., referring to the doctrine that where a judgment, or other incumbrance,† was not registered, it should, nevertheless, bind a purchaser having notice of it, said:—

“All that Equity has done is this—where a purchaser has paid his money to a vendor, with notice of an unregistered judgment against that vendor, there this Court has held that such a purchaser shall not, to the prejudice of the judgment-creditor, shelter himself behind the Registry Acts, which were made to protect parties against charges of which they had no notice, and not against those which were well known to them. . . . But the equity so enforced is merely a *personal* equity, arising out of the character of vendor and purchaser; an equity affecting the conscience of a party paying money with notice.”

Whether Lord Cranworth thought that the equity would have affected a purchaser with notice, claiming under the first such purchaser, does not appear; but, if so, it must have been a fresh equity attaching on the conscience of such purchaser. The case was one where the owner of lands, situate in a register county, had mortgaged them, and the mortgage had been registered, and afterwards the mortgagor had confessed judgments which had never been registered.

\* *Johnson v. Holdsworth*, 1 Sun., N.S., 108.

† *Davis v. Strathmore*, 16 Vez., 410.



The decision was that these judgment-creditors had no right to redeem the mortgagee, because they had no incumbrance on the land.

The common cases, to the effect that an expectancy may be the subject of contract, establish the same principle to a certain extent. A learned \* writer observes—

“ Contracts made by a person before the devolution of the estate or other realisation of his expectancy, are, it seems, purely personal, and only capable of being enforced against the contractor personally during his † lifetime. In *Morse v. Faulkner*, in 1792, the Lord Chief Baron, speaking of such a case, said, ‘ The surrenderor not having any title whatever to the premises at the time of the surrender, his agreement would not raise a lien upon the land, and the present plaintiffs might have been relieved if they had filed their bill against him in his lifetime, that is, after his title had accrued, yet it does not follow that, therefore, they can be relieved against his heirs. Neither the land itself, nor the conscience of the present defendants is bound by this act of William, the surrenderor.’ Similar to this appears to be the doctrine of Lord Eldon in ‡ *Carelton v. Leighton*, for though his lordship is represented as saying that the expectancy of an heir could not be made the subject of assignment or contract” [here the learned writer subjoins “ *Qu.* for ‘ *contract* ’ read ‘ *conveyance* ’ ] “ yet the subsequent sentences seem rather to show his meaning to have been, that though a contract might create a personal liability, there was no such interest as could be assigned, or as would pass, by a bargain and sale, to assignees in bankruptcy.”

There is a House of Lords’ § case which seems, at first sight, to impugn this doctrine, but, rightly considered, it leaves it untouched, for in it there was a legal title to be impugned, and the subject of the contract was one whose loss could be compensated for by damages which might have been recovered in an action.

The above cases seem to prove that Equity recognises

\* Fry Sp. Perf. 400-1.

† It is submitted the words, “ or against his real or personal representatives ” should be subjoined after “ lifetime.”—V. *Ante*.

‡ 3 Mer., 667.

§ *Hoare v. Dresser*, 7 H. of L. Ca., 138.

the principle that a subject of property may be affected, indirectly, through the person of its owner, even in cases where the plaintiff possesses no interest in the subject of property itself, and that this principle will be applied where a specific subject cannot be affected by a contract because the contract designates none, or because there is none in existence, or because the subject does not, at the time of the contract, belong to the contracting party. It is merely another application of the same principle to hold that a similar relief may be granted where some positive enactment prohibits the Court from recognising that the plaintiff possesses any interest in the subject of property, and yet does not prohibit it from applying a personal remedy. There have been some cases on the subject which we now propose to discuss, but we shall not consider the cases on the Ship Registry Acts, because they have turned on the peculiar language and policy of those Statutes.

In *re\* Collis's estate* it was held that probably the true principle is that if by fraud, negligence, or misconduct of the party having carriage of the sale he procures the Court to convey to him property which ought not to have been conveyed, the Court has jurisdiction to compel him to reconvey if the property remains in his hands, and to make a pecuniary compensation if he has sold it.

In *re† Gould's estate* it was held that where the purchase is infected with fraud the Court's equitable jurisdiction will attach to restrain the purchaser from profiting by his fraud.

In *exp. ‡ Truell* it was held that the Encumbered Estates Court had power to recall a deed where by mistake or fraud on the Court it had been erroneously framed, and to correct such error, but the point does not seem to have been involved in the decision.

The above cases, so far as they attribute a power to the Landed Estates Court to modify its conveyance, are over-

\* 14 Ir. Oh., 511. 9 Ir. Jur., N.S., 177.

† 2 Ir. Jur., N.S., 387.

‡ 1 Ir. Jur., N.S., 66.

ruled by *Tottenham's estate*. But they have another aspect. The reason *why* the judges thought they had the powers mentioned was *because* they thought such power belonged to Courts of Equity. So far we submit the cases are sound. They err only in forgetting that on execution of the conveyances the judges of the Landed Estates Court cease to have jurisdiction. Some light may be cast on this matter by another\* case in which the Court held that tenants who suffered damage by the operation of the conveyance might be awarded compensation out of the purchase-money, because then the Court is not dealing with the land nor infringing the conclusive effect of the conveyance.

There is another section† of the Act which has been so much relied on that it deserves a separate consideration. It enacts that—

“Every conveyance . . . shall for all purposes be conclusive evidence that every application, proceeding, consent, and act whatsoever, which ought to have been made, given, and done previously to the execution of such conveyance, has been made, given, and done by the person authorised to make, give, and do the same, and no such conveyance shall be impeached, by reason of any informality therein.”

Now, the writer is unable to see how this section can reach either of the cases under consideration.

In the Anonymous Case with which we started, the fact that every such application, notice, consent and act had been made, or done, would be consistent with the existence of a representation such as existed in that case, and the tenants' rights would not have been impaired by this section if they were not by the other. In *Tottenham's estate* it is true that if an application had been made for the sale of Lord Lanesborough's property, and he had consented thereto, no fraud nor mistake could have existed, and therefore if the Statute means that this is to be conclusively

\* *Bodkin's estate*. 3 Ir. Jur., 131.

† 21 & 22 Vict. c. 72, s. 85

presumed, it means that it must be conclusively presumed that no fraud nor mistake of the nature there in question ever existed, but it is conceived that this is not the true meaning of the Statute. Its meaning, it is conceived, is that every application, &c., which would be requisite for the perfect validity of the conveyance must be presumed to be done. Its object was to save trouble in investigating title, or in satisfying the purchaser, but it does not affect the claim of one who admits that the conveyance has, as respects all the land, comprised in it the full efficacy given to it by the 61st section.

But for the 85th section it might have been contended that if any such preliminary as it there mentioned had been omitted the conveyance was *ultra vires* and void. The 61st section gives a certain efficacy to conveyances made after the performance of certain preliminaries. Section 85 gives the *same effect* to conveyances executed without these preliminaries. Such it is conceived was the object of the Legislature; and if they had used weaker language there would have been danger (having regard to such decisions as *Davis v. Strathmore*) that that intention would not have been carried into effect. The great case on this subject is\* *Power v. Reeves*, but it is really not an authority in point. Lands were sold by auction under the Landed Estates Court, and the owner purchased them through a trustee who was not a solicitor. There was a rule of Court that no person should purchase through a trustee, unless the trustee was a solicitor; but the owner and his trustee seem to have been ignorant of this. The Court pronounced an order rescinding the sale on account of the violation of this rule, and appointing a day (distant about four weeks from that time) for a resale. Four days afterwards the Court caused a notice to be served on the person who had purchased on behalf of the owner, to the effect that the resale was to take place on the day appointed, and that in the meantime the owner might pay into

\* 10 H. of L. Ca., 645.

Court the sum he had bid for the estate, and apply to the Court to be declared purchaser by private contract. This the purchaser did not do, nor did he then appeal from the order made, but on the day of the resale, just before it took place, he insisted before the Court that the Court had no right to rescind the purchase made by him, but that he was entitled to carry it into effect. This the Court disallowed. The sale proceeded, and strangers purchased the land. Nearly a month afterwards a motion (pursuant to a notice served a few days before on the purchaser) was made before the Court that the lands might be conveyed to the owner. This motion the Court refused to hear, on the ground that the owner was in contempt by reason of his having bid through a trustee who was not a solicitor, and having not taken advantage of the permission to purchase by private contract. Afterwards the Court conveyed the lands to the party who had purchased at the resale. More than a month after the resale, but whether before or after the execution of the conveyance did not appear, the owner determined to appeal from the orders rescinding the sale, and served notice of that determination, both on the party having carriage of the proceedings, and on the purchasers at the resale. The House of Lords affirmed these orders, but on the sole grounds that as the conveyance had been executed the purchasers could not be affected, and therefore these orders should not be taken out of the way; for to take them out of the way might render it easier for the owner to proceed against the purchaser at a resale. The Lords did not say they conceived that the removal of the orders would give a ground for relief against the purchasers. If *that* was their opinion it would be a strong argument *in favour* of the view for which we are contending. But assuming their opinion to have been (as it probably was) that the removal of the orders would not give any right against the purchasers, yet the case does not impugn our argument. For though the owner insisted that the Court had no right to rescind the



contract made with him (which probably amounted to asserting that in Equity the land itself, or at least a title to it, was vested in him), and though the purchasers had notice of this assertion, yet they had also notice that the Court disallowed it, and therefore their consciences could not have been affected by it. And if it did not affect their consciences, then certainly the interest which he alleged to be in him must have been at best an interest *in the land itself*, and therefore taken out by the conveyance.

In another House of Lords case,\* one purchased in the Landed Estates Court an estate which was subject to lease, and was described in the rental (*i.e.* particulars of sale) as being so. The conveyance was executed, but it omitted to state the lease. The purchaser recovered judgment in ejectment against the lessee, and on error the House of Lords affirmed that judgment. How the question, as a *legal* question, could have been considered doubtful, seems incomprehensible. And neither the Lords in their judgment nor the judges below in theirs, nor the counsel in argument, seem to have had in view the equities of the case. It is true that in Ireland † equitable defences are still inadmissible in ejectment. But this cannot go further than Lord Mansfield's doctrine as to their inadmissibility, ‡ which only applied in cases of clear trusts, and therefore (the writer submits) to such equitable interests only as were extendible under the Statute of Frauds, and consequently could have had no application to a personal equity like the present.

It appears, therefore, that these cases do not impugn the lines of argument above advocated—lines of argument which singularly enough never suggested themselves to the counsel or judges in *Tottenham's estate*, but which it is submitted are the only ones by which justice in such cases is attainable.

\* *Rorke v. Errington*, 7 H. of L. Ca., 617.

† Report of the Ch. and Com. Law Commissioners. Sir J. Napier's protest.

‡ *Goodright v. Wells*, Dougl., 746. *Doe v. Pott*, *ib.*, 695.

### ART. III.—SALE *IN TRANSITU* BY A BELLIGERENT TO A NEUTRAL.

THE doctrine of sale of property *in transitu* by a belligerent to a neutral State, has given rise, if not to direct conflict of law, at least to a divergence of opinion as between jurists of this country and those of the United States. The question is not only of importance in itself, but is instructive, as illustrating the advance made in modern times in the recognition of and extension given to the rights of neutral countries. A sale under such conditions is one of those transactions which, in the view of international law which prevailed at the beginning of the present century, would be regarded as *primâ facie* so tainted with fraud as to amount almost to conclusive evidence of *mala fides*, and as such to be with difficulty supported as a valid transfer of property. And in later times, in one of the last reported cases in which the subject was judicially examined in this country, the language of the Court was sufficiently guarded as to justify the presumption that a transaction of this description would hardly be considered as otherwise than at least suspicious, and which needed to be placed in the clearest light before it could be supported.\*

It is certainly difficult to one who approaches the study of international law in the same spirit as that in which he would investigate other branches of jurisprudence, to understand why a sale of a ship, for instance, by a belligerent to a neutral State, even *flagrante bello*, should as a transaction be deemed doubtful or invalid. To account in some measure for such a consequence, we must have regard to the extreme care for belligerent rights, which formerly in this country, and indeed throughout Europe generally, influenced the administration of the public law of nations. The desire to

\* *Sorensen v. The Queen*, 11 Moore, P.C.O., p. 141.

secure for a belligerent State the enjoyment to the fullest extent of the rights which war was supposed to give him as against his enemy, led to the doctrine laid down in the Prize Courts of Great Britain and the United States, that property cannot be divested of its enemy-character *in transitu* on the high seas, and that all property which has a hostile character impressed upon it at the inception of a voyage, remains liable to capture until its arrival at its destination; a principle which rested on the theory that a sale to a neutral was supposed to lessen by so much the stock of property that was available for capture, and thus to diminish the prize of war.\* It was, to use the words of a modern writer, in fraud of a belligerent's rights as against the property of his enemy.† It is obvious that a sale by a neutral to a belligerent might have, with greater show of reason, been objected to on the ground that while it added to the resources of the enemy, it involved a departure from neutrality on the side of the selling State. But that the converse of this position should have been accepted as an undoubted principle of public law can only be accounted for by the leaning in the Maritime Courts, not only of England but of continental Europe, to that vicious theory of prize which resisted any doctrine that would break in upon the rights of war, or lessen the advantages which were open to a belligerent from the exercise to its fullest extent of the right of capture.

The theory upon which this doctrine rests is this, that as between hostile States a belligerent has a vested right by a declaration of war in all sea-borne private property of the other belligerent, that such property cannot be the subject of sale, and that all contracts of sale touching belligerent property of any sort, though valid on land, is invalidated by the mere fact of such property being upon the ocean.

\* *The Frances*, 1 Gall., p. 448. *The Vrow Margaretha*, 1 c. Rob., p. 839. See also *Sorensen v. The Queen*, 11 Moore, P.C.O., p. 119.

† Twiss, "Law of Nations"—Time of War, p. 465.

This view, it has been remarked by a distinguished American authority, seems to rest on a principle of Maritime Prize, which probably, if it again came into controversy, would be subject to considerable modification.\* And this view it is now proposed to examine; how far it is tenable, and to what extent it can be relied on in future international transactions touching the sale of belligerent property.

The doctrine itself is thus stated by Mr. Justice Story:—

“A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships—not being ships of war—from either belligerent, and the purchase is valid whether the subject of it be lying in a neutral or in an enemy’s port. During a time of peace without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor if war afterwards unexpectedly breaks out. But in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such a case a mere transfer by documents, which would be sufficient to bind the parties, would not be sufficient to change the property as against captors, as long as the ship and goods remain *in transitu*.†

And in citing and commenting on this passage with approval, as containing a correct exposition of the law of nations on the subject, the Judicial Committee of the Privy Council in a recent case make the following remarks:—

“In order to determine the question it is necessary to consider upon what principle the rule rests, and why it is that a sale, which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy’s port, is ineffectual if made while the ship is on her voyage from one port to another. There seems to be but two possible grounds of objection. The one is that while the ship is on the seas the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is that

\* Opinions of Att. Gen. (Cushing), vol. VI.

† Story. Practice of Prize Courts, pp. 63, 64.

the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat *the inchoate right of capture by the belligerent* until the voyage is at an end. The former, however, appears to be the true ground on which the rule rests. The difficulty of detecting fraud if paper transfers are held deficient is so great, that the courts have laid down<sup>\*</sup> as a general rule that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors the possession as well as the property must be changed before seizure."\*

The assumed right, therefore, of a belligerent to annul sales of an enemy's ships to neutrals is founded on the allegation that *some* of such sales may be simulated and fraudulent. But the principle does not stop there. The fear of collusion, it is obvious, is applicable to other property as well as to ships. And, if the assumed consequence be admitted, it follows that *all* goods of the growth or produce of a country at war, nay all other goods which have at any time in the progress of war belonged to that country, are subject to capture and condemnation in the hands of the neutral nation; and the soundness of this doctrine, namely that no distinction in this respect can be made between ships and other objects of commerce, has, as observed by a learned writer, been fully recognised in the adjudications of the Admiralty Courts of England.

It is strange that a position so extensive in its consequences, and so adverse to neutral rights, should have received the assent of publicists, and be accepted almost without controversy as a principle of public law. The explanation probably is that at the time when this and other kindred questions were investigated, the rights of belligerent States occupied in the view of jurists and statesmen a principal place, while those of neutral countries were either not understood, or were treated as involving no considerations of importance. The legal incidents to neutrality were as yet so undefined, and presented so little that was attractive, that any concession that was made

\* *Sorensen v. The Queen*, 11 Moore, P.C.C., p. 141.



to a country occupying a position so ungrateful and invidious, were granted rather as of favour than as of right. This feeling can at all events be distinctly traced throughout the judgments of Sir W. Scott, the main, if not the exclusive source, from which writers in this country have drawn their views of international law.\* As an illustration of how prevalent was this feeling, may be cited the following statement of the doctrine taken from the writings of a civilian of admitted eminence in this country, and who is certainly not open to the charge of being adverse to neutral rights. Sir Robert Phillimore, in his work on International Law, thus speaks of the question:—

“In respect to the transfer of enemies’ ships during war, it is certain that purchases of them by neutrals are not in general illegal; but such purchases are *liable to great suspicion*, and if good proof be not given of their validity, by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of the neutral claim,† and if the purchase be made by an Agent his letter of procuration must be produced and proved;‡ and if after such \* transfer the ship be habitually in the enemies’ trade, or under the management of a hostile proprietor, the sale will be deemed merely colourable and collusive.§ But the right of purchase by neutrals extends only\* to merchant ships of enemies;|| for the purchase of ships of war belonging to enemies is held to be invalid;¶ and a sale

\* Lord Stowell’s severity against neutrals was notorious. Upon the question, for instance, of allowing costs as against the captors in cases where the capture was unjustifiable, Dr. Lushington has observed that during the seventeen years Lord Stowell presided in the Prize Court, he had condemned captors in costs and damages in only about ten or a dozen cases; not one in a thousand. (*The Oetsee*, 2 Spinks, Eccl. & Ad. cases, p. 174.) And in another case the same learned judge observed that ‘he believed not one case could be found where Lord Stowell condemned the captors\*in costs and damages upon the ground that the papers and depositions did not disclose a probable cause of capture. (*The Leucade*, *ibid.*, p. 224.) And with but slight departure from these principles, we find it decided even so lately as during the Russian War, that if captors seize a vessel without any ostensible cause they are liable to costs and damages; but that this is the extremity of the law of nations, and should only be adopted in cases of imperative necessity. (*The Oetsee*, *ibid.*)

† See 1 Rob. Rep., p. 102.

‡ *The Argo*, 1 Rob., p. 158.

§ 4 Rob., p. 31.

|| *The Minerva*, 6 Rob., p. 396.

¶ *Ibid.*, p. 396.

of a merchant ship made by an enemy to a neutral during war, must be an absolute unconditional sale. Anything tending to continue the interest of the enemy in the ship vitiates contracts of this description altogether." \*

Now, upon this passage it is sufficient to observe that the point of view from which the question is regarded is exactly opposite to that from which under the more advanced opinions which now prevail, of international obligation, it would be considered. The presumption here, and throughout the judgments of Sir W. Scott, of which the extract is a summary, is *prima facie* against the validity of such sales, which from their very inception are regarded as so open to suspicion as to require to be fenced round with conditions imposed by a belligerent on a neutral State, as necessary to be complied with in order to make a sale of a certain article of merchandise valid. In other words, a third party is permitted, under a theory of supposed possible damage, to dictate the terms under which alone the purchase of the *res*, the subject of commerce, would be legal; to determine, that is to say, the conditions under which the nationality of a private ship is by another and a neutral country to be ascertained and fixed, or the ship itself bought or sold. Now this is exactly what no nation has the smallest right to do: it is *ultra vires* throughout; it amounts to an infringement not only of the privileges which surround a neutral attitude, but to a violation of acknowledged principles of law. For it must be recollected that in accordance with every known system, not only of public, but of private and municipal law, possession of property has been invariably regarded as presumptive of ownership; that any power whether during peace or war, who claims, by virtue of relations growing out of hostilities, to take property from a neutral country as having been tainted with vice in its acquisition, must, like any private person, show his right to do so, and a title superior to that of the person or State in whose possession the property is, and

\* Inter. Law, vol. III., p. 607.

that if in a contract of purchase and sale *mala fides*, or wrongful possession, is alleged, the fact must be proved before the property is divested. These are the common and most familiar principles which lie at the root of such transactions. The circumstance that the parties to the contract are States and not individuals does not suspend or vary conditions which are present to every transfer of the kind in private commerce. A state of war does not introduce any new element, nor, whatever may have been formerly the rule, does it necessarily interrupt trade as between neutral and belligerent, one class of commodities and one destination of them alone excepted, namely, articles which are contraband of war, or avowedly intended for places blockaded or invested. In a word, neutral commerce is, with this exception, subject to no more restrictions in war than in peace, and is open to have its legality tested by the same principles in the one case as in the other.

The soundness, therefore, of the assumed rule that the mere fact of sale of property by a belligerent to a neutral *in transitu* is to be taken as proof, or even as presumption, of collusion or fraud may well be questioned, not only as being opposed to the principles of public law, which secures to every nation the right of determining the nationality of its own property, but as contravening those wider maxims which regulate the transfer of all property whatsoever, whether on land or sea. If International Law confers on neutrals the right to purchase, during war, the property of belligerents, any regulation of a particular State not a party to the original transaction, which would urge that the transfer was invalid because it was not accompanied by delivery, for example, in other words, because there was a change of property without a corresponding change of possession, or which would object to it on the score of possible fraud, must be regarded as nothing else than in derogation of the sovereign authority of an independent State. And so with respect to the qualifications under which, in the passage quoted above from the writings of Sir R. Phillimore, such sales would alone be valid; it is

sufficient to observe that to insist on such conditions as the production of a bill of sale, the absolute proof of payment of a certain sum, which, moreover, must not be merely colourable; or letters of procuration where the sale was made by an agent; these and similar requirements third persons, whether nations or individuals, not of the original parties to the transaction, and with no ostensible interest in it, cannot be considered in a position to enforce. The absence of these documents, or of such methods of proof, may be suspicious, but may not justify annulling the sale. There may be *damnum*, but it is *damnum absque injuriâ*. And so of nationality, all property, and especially that floating on the ocean, must have a nationality, and it is, as remarked by a learned writer, the prerogative of every nation to prescribe for itself rules to determine this nationality in the case of that species of property known as merchant vessels; and there is nothing in the law of nations which requires that a ship, in order to partake of the nationality of a particular country, should have been constructed in that country; or which negatives the general right of one nation to purchase and naturalise the ships of another. On this point each nation has a right to prescribe rules for itself.\*

It is not, indeed, improbable that this and kindred questions of international law will, probably, when next they should be drawn into controversy, be investigated in a wider spirit of jurisprudence, and one more inclined to give expansion to the rights of neutral powers, than can hitherto be traced as influencing the decisions of the judges in this country on matters of public law. And of this spirit an example may be found in a recent case decided by Dr. Lushington,

\* "It is true that the prize regulations occasionally issued by some belligerent nations have undertaken to prescribe a limitation in time of war of the right to purchase, naturalise, and neutralise foreign ships, to the effect that in order to exempt from capture, in the hands of a neutral, a merchant ship purchased from the belligerent, it must be shown that she was so purchased before the existing war, or else after capture and lawful condemnation."—Hubner de la saisin des bâtimens neutres, tom. 1, part 2, ch. 3, s. 10, no. 4.

when the point was raised as to the validity of the assignment of a merchant ship by an enemy subject to a neutral during a period of hostilities, under circumstances which, by Sir W. Scott, would, probably, be regarded as surrounding the transaction with grave suspicion, if not conclusive of fraud.\* It was then held by the learned judge that the voluntary transfer of a ship by a father, an enemy, to his son, a neutral, as an advance of a portion of his inheritance is valid if made *bonâ fide*, and the Court did not consider itself inclined to hold a mode of acquiring property which was perfectly legal in time of peace, to be prohibited to neutrals in time of war. It was further observed by the learned judge that if reference was made to the law of nations simply, he was not aware that when a vessel was *de facto* by the authority of a neutral government, incorporated into the mercantile marine of that State, the Court has inquired narrowly, if at all, into the law of that State, or how far its municipal regulations have been strictly complied with; and he was of opinion that such an inquiry would be attended with great inconvenience, and could not be prosecuted with reasonable facility, or the probability of doing justice. "Every State," he proceeded to observe, "differs with respect to the regulations of its mercantile marine; the Court is not disposed to enter upon an investigation of systems of jurisprudence in foreign States which it is not competent thoroughly to understand."

The sale in this case accordingly was upheld, although the judgment did not go to the entire length to which in our opinion it might legitimately have gone, namely, that of allowing the presumption of law to be in the first instance in favour of the transfer being valid. It was perhaps unnecessary for the purposes of this decision to lay down any such dictum in general terms. The case, however, is noteworthy as recognizing two principles to which greater weight will doubtless be given in deciding future cases of disputed ownership. One

\* *The Benedict*, Spinks' Prize Cases, p. 314.



is that to which allusion has already been made, namely, that no attempt was made to prescribe the conditions or to dictate the rules under which other nations should be allowed to invest with their nationality private merchant ships; and the other, that all questions of international law, and especially of the law maritime, should be investigated and determined on equitable principles, rather than those *stricti juris*. If, to take an illustration from the English system of jurisprudence, a Court of Equity permits interests in property to be created by methods far less technical—a simple declaration of trust, for example—than are required for the transfer of the legal interest in a Court of Law, a like exemption from strict conditions might not improperly be extended to transactions arising under the maritime or public law of nations, which it is well known is based on those maxims of equity which enter so largely into the private law of merchants. In like manner, in the case before Dr. Lushington on which these observations are made, we find the equitable doctrine of advancement relied on and given effect to in his decision as operating to rebut the presumption which would go to render the transfer illegal, and cause the property, the subject of gift, to remain clad with an enemy character and ownership. And no doubt it is the province of a Court of Justice to avail itself of every means for giving effect to engagements which are not contrary to municipal law or public policy, and not to cast about for reasons whereby to defeat or render nugatory transactions which do not on the face of them offend against justice. It seems to be a false view of the office of a judge to conceive that it is then properly exercised when giving prominence and force to the weak or invalid, instead of the valid, elements in any contract or obligation. And if this is the case with the ordinary tribunals of a nation entrusted with the administration of private law as between individuals, it is much more so when the system of law, the subject of interpretation, is international, based on a larger equity, and dealing with engagements to which whole communities are parties. And, moreover, as has been already

observed, it is a highly artificial idea which imports into simple contract as between two private persons, terms and incidents springing either from the relations in which the contracting parties themselves are placed to the governments to which they are subjects, or from the position, whether hostile or neutral, in which those governments stand towards each other.

Whatever therefore may hitherto have been the received doctrines of civilians on this question, it may now be stated that little doubt remains as to the right of a neutral to purchase a foreign ship of a belligerent power, at home or abroad, in a belligerent or neutral port, or even upon the high seas, provided the purchase be made *bonâ fide*, and the property passed absolutely and without reserve, and the ship so purchased becomes entitled to bear the flag and receive the protection of the neutral State, the purchaser. It is true that this is a view of the subject which may not have passed beyond the region of controversy; but certainly, as observed by a learned writer, it is a point which, if judicial conviction, positive law, and international policy have not yet reached, they are irrepressibly tending towards it both in Europe and America.\*

#### ART. IV.—COURTS OF PRIZE.

WE propose to examine, in connection with the subject of private property at sea, which we noticed in a former number, into some of the principles which lie at the root of the constitution of Courts of Prize: a species of tribunal peculiar to the maritime law of nations, as it has, at least, been generally understood and interpreted, and which presents some anomalous features but little in harmony with accepted maxims of other systems of law.

The importance of a sentence of condemnation of a properly

\* Opinions of Att. Gen., vol. VI.

constituted Court of Prize in order to a transfer of property in the *res*, the subject of capture, is now generally admitted by writers on the law of nations. Sir W. Scott, in a well-known case, thus speaks of the effect of the decision of such a tribunal, and its necessity in order to give a valid title to the neutral purchaser:—

“It is frequently said that it is the peculiar doctrine of the law of England to require a sentence of condemnation as necessary to transfer the property; and that, according to the practice of some nations, twenty-four hours, and, according to the practice of others, the bringing *infra præsidia*, is authority enough to convert the prize. I take that not to be quite correct, for I apprehend that by the general practice of the law of nations a sentence of condemnation is, at present, deemed generally necessary, and that a neutral purchaser in Europe during war does look to the legal sentence of condemnation as one of the title deeds of the ship if he buy a prize vessel. I believe there is no instance of a man having purchased a prize vessel of a belligerent who has thought himself quite secure in making that purchase, merely because the ship had been in their possession twenty-four hours, or carried *infra præsidia*. The contrary has been more generally holden; and it is amongst those documents which are most generally produced by a neutral purchaser, that if she has been taken as a prize it should appear that that prize has been in the proper judicial form subjected to adjudication.” \*

And to a like effect Lord Mansfield, in his celebrated reply to the Prussian memorial, states that “the proper and regular court for these condemnations is the court of that State to which the captor belongs.”

Such is the nature and effect of the sentence of a Court of Prize. These sentences are, it is well-known, *in rem*, operating on the *corpus* or substance of the thing acquired, and are, therefore, binding on the rights of third parties, and are to be received as admissible and conclusive evidence of the facts

\* The *Flay Oyen*, 1 Rob. Rep., p. 117; see *Havelock v. Rockwood*, 8 J. Rep., 270. Answer to the Prussian memorial concerning neutral ships.—Harg. Collec. Jurid., p. 134. And see Note to *Schacht v. Otter*, 9 Moore, P.C.C., p. 156.

on which they profess to decide, provided the ground of condemnation is stated without ambiguity on the face of the sentence, and shows a clear infraction of the public law of nations.\*

These tribunals, however, present in one chief respect an anomaly in jurisprudence for which no very satisfactory explanation has yet been found. For while, in the case of all other courts, whether of public or municipal law, it is of the essence of a judicial inquiry that the court should be absolutely neutral in respect of the claim of the parties to the cause; in the case of tribunals for the trial of maritime causes under the law of nations, the litigant who claims the property by virtue of capture is a subject of the State by whose judicial officers and procedure the right is examined and decided, and not only is this the case, but the tribunal is, moreover, one to which the neutral is forced to submit, and to which, in no sense, can he properly be said voluntarily to subject himself. Further, it has been well settled that any attempt to erect a court—except for a qualified duty in cases where there has been a direct infringement of neutrality—within the dominions of a neutral State, an arrangement which would seem at first sight the best for securing an impartial administration of justice, is tantamount to a serious violation of international law, as being an invasion of belligerent rights.† Such a court is not, in fact, regarded as one of competent jurisdiction, and to its sentences, so far are they from being held conclusive, no value whatever is attached.

But little attempt has been made by writers on the law of nations to examine into the origin of Courts of Prize, or to explain their jurisdiction. Sir W. Scott, in a well-known case, seems to place the matter upon the usage and practice of nations simply, without attempting to account for it on any principle known to jurists.

\* Smith Leading Cas., vol. II., p. 639, and cases there quoted. *Hobbs v. Hemming*, 17 Com. Bench Rep., N.S., p. 819.

† By Sir W. Scott, the *Fluyt Oyen*, 1 Rob. Rep., p. 117.

"In my opinion," he says, "even if it could be shown that regarding mere speculative general principles, a condemnation of such a tribunal—a Prize Court sitting in a neutral country—ought to be deemed sufficient, that would not be enough. More must be proved; it must be shown that it is conformable to the usage and practice of nations. A great part of the law of nations stands on no other foundation. It is introduced indeed by general principles; but it travels along with those general principles only to a certain extent, and if it stops there you are not at liberty to go further and say that mere general speculation would bear you out in further progress. . . . The practice of nations is to be gathered from approved writers on the law of nations, and no one country has a right to innovate in these matters by its own authority. . . . I must take my stand on the ancient and universal practice of mankind."\*

And similarly Chancellor Kent:—

"Every species of capture," he says, "as between belligerents is deemed lawful, and there is no such thing as a marine tort; hence questions of prize have never come within the cognizance of a neutral country."†

It is in one of Lord Mansfield's judgments that, for the first time, we come upon an attempt to trace back to its source the origin of the Court of Prize, and to distinguish their jurisdiction from another Court, that of the Admiralty, with which, though in truth quite distinct, it has been sometimes confounded. We offer no apology to our readers for presenting them with some extracts from a judgment upon a question which is not only one of historical value, but which presents many points of interest to the student of international law.

"Prize or no prize is not a matter triable at Common Law. The same reason why the jurisdiction is appropriated by the Admiralty is that prizes are acquisitions *jure belli*, and *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country."

\* *The Flay Oyen*, 1 Rob. Rep., p. 117.

† Com., vol. I., p. 116.



“Capture cannot, whatever may be the consequences either to individuals, or to the ship and cargo their property, be regarded as between enemies as a maritime tort ; it is merely the exercise of the *jus belli*. And this is so even where the original seizure as prize was determined in the Admiralty Court to be wrongful, and the ship declared no prize. For any subsequent matter arising out of such sentence, even though grounded on the fact of piracy, is not triable in a Court of Common Law, which, if it entertained the cause, must open up the whole question again—but is appropriated to the sole jurisdiction of the Admiralty. There are no Prize Act books further back than 1648. Prior records are in confusion, and illegible.”

“It appears that jurisdiction in matters of prize (whether it be coeval with the Court of Admiralty, or, which is much more probable, of a later institution beyond the time of legal memory) though exercised by the same person, is quite distinct. In the commission of the Judge of the Admiralty Court every object of his jurisdiction is enumerated generally as well as particularly ; but not a word of prize.”

“To constitute *that* authority, or call it forth, in every war, a commission under the Great Seal issues to the Lord High Admiral to will and require the Court of Admiralty to proceed upon all and all manner of captures, reprisals of all ships and goods that are or shall be taken ; and to hear and determine according to the course of the Admiralty and the law of nations.”

“The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself ; it is no more like the Court of Admiralty than it is to any court in Westminster Hall.”

“From 8 Eliz. cap. 5, it appears that in civil and marine causes there were many appeals which the Statute restrains to one to the king in Chancery, to be finally decided by delegates. But prize is not a civil and marine cause, and the appeal is to commissioners consisting of the Privy Council. . . . The end of a Court of Prize is to suspend the property until condemnation ; to punish any sort of misbehaviour in the captors ; to restore instantly *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote) if upon the most summary examination there don't appear a sufficient ground ; to condemn finally if the goods really are prize, against

everybody, giving everybody a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay." \*

Such is the graphic account given by this great judge of the jurisdiction of the Court of Prize. In another case in which he mentions the subject,† he in like manner refers for the origin of these Courts to authority and immemorial usage. He cites from Rymer, vol. xii., p. 690, treaties made between Henry VIII. and Louis XII. in 1498; and a treaty between Henry VIII. and Francis I. in 1526, in which it is laid down and demonstrated that the jurisdiction of prize in the Admiralty and Commissioners of Appeal was then "pretty much as it is now." But he goes on to observe:—

"The most ancient instrument shows a prize jurisdiction either inherent, or by commission, in the admiral. It is a letter from Edward III. to the King of Portugal (Rymer, vol. vi., p. 15), and recites a complaint that the admiral before whom the goods were judicially demanded, determined that they should not be restored, as having been taken in war.\*†

The jurisdiction, therefore, of these Courts, is derived, at least in England, partly and immediately from the Commission under the Great Seal, creating at the commencement of a war a High Court of Admiralty *ad hoc*,§ and partly and

\* *Le Caux v. Eden*, 2 Douglas, 594.

† *Lindo v. Rodney*, *ibid.* 613, in notis.

‡ Mr. Justice Storey observes (Prize Courts, p. 53) that in cases of capture by government ships the proceedings in England are exclusively carried on by officers of the government, and no other persons can interfere to support or pursue a suit where they do not consent. (*The Elebe*, 5 Rob., 173.) Whether the same exclusive authority exists in the United States has never yet been made the subject of question in the Supreme Court. For a luminous account of the practice in English Courts of Prize, the reader is referred to a joint letter from Sir W. Scott, and Sir J. Nicholl, to Mr. Jay, then American Minister at this Court, dated 10th September, 1794, which will be found cited at length in Judge Storey's work on Prize Courts. A note of that learned judge on the same subject, appended to the 2nd vol. of Wheaton's Admiralty Reports, p. 494, may also be usefully referred to.

§ See Twiss, "Law of Nations"—Time of War, p. 334.

mediately as it is placed by Sir W. Scott on the general usage of nations.\* Recently, however, an attempt has been made by a distinguished American jurist, to treat the subject on a basis somewhat more comprehensive, and detached from the mere municipal usages of particular countries, so as, if possible, to make the anomalous features of these Courts square with received maxims of jurisprudence. Mr. Dana, in a note to his edition of Wheaton, has the following remarks:—

“ Trial by prize is not a right which *enemies* can claim, nor a duty to them. They have no standing in court. If it be assumed that all captures are enemies' property there need be no prize courts. But the fact that so large a proportion of them are of neutral property, charged as involved in violation of the rights of war, or as property whose nationality as neutral or hostile is doubtful, has led to the establishing of these tribunals. Their origin is in the responsibility of the belligerent government to neutral governments for the acts of its cruisers. The true nature of a prize tribunal may be described by a phrase, for which, indeed, I find no precedent, but which is nevertheless appropriate, *an inquest by the State*. As the belligerent sovereign is responsible to neutral governments for aggression on the persons or property of their subjects, he desires and is required to inform himself, by recognised modes, of the lawfulness of the capture. For this purpose he commissions learned and impartial persons by a temporary commission, or by permanent legislation, to hold an inquest upon all captures. . . . The theory on which Prize Courts proceed seems to be this—the capture is an act of the government, or adopted as such by the request of the government for a condemnation. Before condemning it opportunity is given to any person who has a title to it to establish a right of restitution. *Primâ facie* the prize is the property of the government. No one is heard to contest the title of the government but a citizen or neutral who has an interest in the property. Any intervenor must, of course, not only prove his title and right of possession—as in the case of lost goods sought to be taken from the hands of the finder—but must also show that, as the general owner and pos-

\* *Lord Camden and others v. Home*, 4 Term Rep., p. 382; *Linds v. Rodney*, 3 *ibid.*, p. 613.

essor before capture, he has a right, under the laws of war upon the evidence, to a restitution. If the claimant fails, either to make out a clear *bonâ fide* title to the property and possession, irrespective of the belligerent question, or if, having such title, he fails to establish his right to restitution as against the government, and the case, after fullest examination and hearing of counsel, is left in doubt, the claimant before the court fails. If no other claimants appear who can establish a right, the capture stands justified, and the property is condemned to the government, or, in other words, not being restored remains in the government. . . . But the Prize Court, after all, is not a tribunal to which parties have voluntarily subjected themselves by putting either their persons or their property within its jurisdiction. On the contrary, the property being usually on the high seas, and under neutral flags, is seized by force under powers of war, and carried by force into the belligerent's jurisdiction, and the neutral owner compelled to appear before the foreign tribunal, the creature of the belligerent, or lose his property. The sovereign is, therefore, held responsible to the State whose citizen the claimant is, that no injustice is done by the capture. If the sovereign does not submit the capture to adjudication, or if the court is not constituted, or does not proceed in the manner recognised by the usage of nations, or, still more, if the sovereign should undertake to confiscate the property against the decision of his own tribunal, a cause of complaint exists between the two States which should form the ground of diplomatic representation."

It will be seen from an examination of this view of the question by Professor Dana, that these Courts spring indirectly, but not less really, from the right of search, although their operation is directly enforced by commission from the sovereign, and moulded by conformity to the usages of public law. And this right is one which, vexatious as it cannot fail to be in all its immediate incidents, no matter with what courtesy or judgment it is exercised, is yet more productive of loss in its ultimate results if the ship and cargo are sent into port for adjudication. Hence in proportion as this right is curtailed, and the exemption of private

property at sea from capture and confiscation is extended, so in proportion will the cases over which these Courts have jurisdiction be deprived of much of their importance. There is indeed another class of cases of which they never seem to have taken cognisance, and which in one shape or another are proper for the determination, or the arbitration rather, of a neutral State. These are questions in which it is not so much the legality of the acts, or the character of the property, of a neutral country or its subjects which are the subject of inquiry, as when the grievance complained of is the unfair employment, or the undue concession of rights, which in the abstract may not as matters of strict law be open to question, yet which are, as granted or denied, exposed to the charge of unfriendliness or a departure from a position of true neutrality. Of this class a prominent instance is the case of the *Alabama*, in which no proposition of strict law was in dispute, but which did not the less, in one aspect of it, involve a departure from that spirit of equity which should govern all transactions as between neutral and belligerent States.

These considerations would seem to point as a conclusion to the advisability of neutral countries, or such one neutral State as may be agreed upon at the outset of a war, taking upon itself, by way of arbitration, the duty of inquiring into, or, to use Mr. Dana's expression, "holding an inquest" upon, the legality of captures made upon the high seas in time of war. This view is not advanced without diffidence in face of the general acquiescence in the existing system, but in support of it may be alleged two other facts familiar to the student of the maritime law of nations. In the first place it is to be borne in mind that, although the existing arrangement has been accepted as that which on the whole was the best that circumstances admitted of, yet that in the constitution of these Courts consideration for the rights of neutrals had no place. Belligerent rights were at the time alone or almost exclusively regarded; and while it is undoubtedly true



that the decisions of the Prize Tribunals of this country and of the United States are of admitted authority, and have never failed to command universal respect, yet it is no less the fact that in other countries these sentences of courts, sitting in the belligerent's country, have been made instruments of great injustice. The theory of course was, and is still, that the sentence of a foreign Court of Admiralty of competent jurisdiction was binding upon all parties, and in all countries, as to the fact on which the condemnation proceeded, where such fact appeared on the face of the sentence, free from doubt and ambiguity.\* But it was not long before the judges in England found it necessary extensively to modify this rule, and by many exceptions to guard against its being made an engine of fraud.

"We show," said Lord Ellenborough in one case, "sufficient respect to French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. This sentence" [of the Admiralty Court at Martinique, declaring the ship and cargo good and valid prize as being English property], "does not say the ship was *not American*, and it is not to be considered evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider everything as good prize against all mankind."†

So, on a subsequent occasion, his lordship expressed himself to a similar effect—

"I am by no means," he said, "disposed to extend the comity which has been shown to these sentences of foreign Admiralty Courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favour rests on an authority in Shower‡ which does not fully support it, and the practice of receiving them often leads in its consequences to the greatest injustice."

\* *Dalglish v. Hodson*, 7 Bing., 504.

† *Fisher v. Ogle*, 1 Campbell, 418.

‡ *Hughes v. Cornelius*, 2 Shower, 232.

And at length, in the most recent case in which the operation of these sentences was examined in an English court, we find the judges laying down the rule that the sentence of a foreign Court of Admiralty condemning a ship or goods as lawful prize, is not conclusive in the courts of this country as to the ground of condemnation, unless stated on the face of it without ambiguity; and that it was competent to the courts here—that is, in a neutral country—to examine the sentence carefully, to see whether it proceeds on that which would be a just ground of condemnation by the law of nations, or on another ground which would only amount to a breach of the municipal regulations of the condemning country.\*

It of course follows from this, that if these sentences are not to be accepted as simply conclusive, and as operating directly *in rem*, but may on any ground whatever be re-examined by the court of a neutral State before which the matter would come in another shape (as *e.g.* a cause of marine insurance, alleged to be void from the warrant of neutrality not being complied with) it is with the latter court that the decision of the case would virtually rest.

The view here taken of the defective character of prize jurisdiction as it exists under the present law of nations, and the necessity of amendment in the procedure, derives strength from two considerations which we would here notice. The first is that a very considerable jurisdiction in cases of prize is already vested in the courts of a neutral power, where its neutrality has been invaded, as for example, where the capture has been made within the limits of the neutral territory. The principle upon which this jurisdiction rests, and which has been extensively exercised by the courts of the United States, is thus stated by an eminent American judge:—

“The general rule,” he says, “is undeniable, that the trial of captures made on the high seas, *jus belli*, by a duly commissioned

\* *Hobbs v. Hemming*, 17 Com. Bench, N.S., p. 791.

vessel of war, whether from a neutral or an enemy, belongs exclusively to the courts of that nation to which the captors belong. To this rule there are exceptions which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which her prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. This is necessary to the vindication of their neutrality." \*

And in fact traces of the exercise on the part of Great Britain at an early time may be found, as Sir Travers Twiss points out, in the writings of Sir Leoline Jenkins, who was judge of the High Court of Admiralty in the reigns of Charles II. and James II.,† and Lord Stowell has incidentally recognised the right of a neutral country to take cognizance of prize of war, although the point has never yet been directly raised or decided in the English Admiralty Courts. Indeed not only is this so, but it appears that at one period in our history it was generally held to be within the competency of the Admiralty Court of a neutral power to take cognizance of *all* captures made on the high seas of the property of its own subjects by belligerent vessels, if the captors should have brought their prizes into its ports.‡ The proposition, therefore, to entrust these Courts with a jurisdiction still more extended and defined is not a novel one in public maritime law. But, secondly, the allowed hardship, if not positive injustice, of the present system, as bearing on neutral property belonging to private persons, seems to call for some such alteration as is here proposed. The case of such persons is a hard one, for not only is their only appeal to the courts of the captor sitting in his—the captor's—country, and exercising a jurisdiction derived from its sovereign, but even where the capture has been held unlawful, and restoration is decreed, it is seldom that anything like adequate compensation is obtained for the

\* The brig *Alerta*, 9 Cranch, p. 364.

† "Law of Nations," p. 482.

‡ See Twiss *ut sup.*

loss incurred. For, as Professor Bernard remarks,\* the jurisdiction of such a court is an incessant struggle with artifices and contrivances which are traditional, easy to practice as they are difficult to unmask, and which, it may be added, have been matured into a system under influences eminently favourable to belligerent, and unfavourable to neutral rights. But more than this, the practice—one of general acceptance in maritime law, as it is one most repulsive and opposed to the ideas of modern civilization—according to which if the captor cannot, as the Confederate States in the recent civil war seldom could, bring his prize into a port of his own country, he is justified in burning them at sea, this custom, exercised recently, as we know, in all its uncivilized severity, and not prohibited by international law or usage, may now under circumstances of the least suspicion be resorted to by captors who see no other mode of disposing of their prey, and of weakening the resources of their enemy. The wanton destruction of the private property of innocent merchants would be considerably lessened, if not altogether removed—for it is seldom the captor's own interest to exercise this *summum jus* of war, which is at the same time *summa injuria*—if neutral ports, and neutral tribunals rendered inviolable and sacred by the immunities thrown around them under the law and usage of nations, were to have the custody of and pronounce upon the property in belligerent captures.

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#### ART. V.—THE WASTE LANDS OR COMMONS OF ENGLAND.

THERE has been a variety of conjectures as to the etymology of the term *manor*. Sir Edward Coke was of opinion that the term was derived from the French word

\* *Neutrality of Great Britain during the American War*, p. 313.

*mesner*, signifying to govern or guide, because the lord of the manor had the guiding and directing of all his tenants within the limits of his jurisdiction. See his "Copyholder," s. 31, where he says—

"And this I hold the most probable etymology, and most agreeing with the nature of a manor; *for a manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or site.*"

But Bracton and others tell us that it is derived either from the French *manoir*, or from the Latin *manendo*, as the usual residence of the owner on his land. As the French word *manoir* means not only mansion house, but perfectly corresponds with our word *manor* also, this derivation seems the most reliable.

A manor is defined to be *nomen collectivum et generale*, comprehending messuages, lands, &c., and is the district or aggregate compass of ground granted by the ancient kings of this realm to the lords or barons, with liberty to parcel the land out to inferior tenants, reserving such duties and services as they thought convenient, with power to hold a court (from thence called the Court Baron) for redressing misdemeanours, punishing the offences of their tenants, and settling disputes of property between them.

Upon the creation of manors the lords took, of course, as much as they thought fit into their own hands, distributed other parts among their tenants, and the uncultivated residue was called *the lord's waste*. In some instances the greater barons granted out smaller manors to others, and then the seignory of the superior baron, or lord paramount, was frequently termed an honour.\* When William the Conqueror subdued this kingdom, Lord Moreton, Earl of Cornwall, received, as his share of the spoil, 798 manors; and when Cromwell seized the lands of the Irish royalists he divided 5,000,000 of acres among his adherents.

\* See Scriven on Copyholds, 1 and 2.



As an honour consists of many manors, so a manor may consist of one or more villages and hamlets adjacent, or only of several houses in a village. It is not necessary that the copyholds should be contiguous, for there are many manors where the copyholds lie dispersed at a considerable distance from each other, and frequently in different parishes and hundreds.

These different manors are subject to different customs, even of descent and dower or free-bench; and the various rights of the lords and their tenants have been a fertile subject for litigation from the earliest times to the present. Seignorial claims to franchises, such as free-warren, free-fishery, and the like, the rights of sporting over their tenants' lands, of appointing gamekeepers and other officers, have been prolific of much bad blood and good treasure.

The right of the property in mines at one time elicited almost as grave a decision as that recorded by Cowper under the name of "*Nose v. Eyes*." A bishop, a messenger of peace (the Bishop of Durham was the lord in question), brought a suit in Equity and an action of trover to restrain a customary tenant from digging ore on the manor without accounting for the same to the bishop. The Lord Chancellor, Hardwicke, was fairly puzzled, and referred the case to a jury, who seem to have been sadly confused with the evidence. Whereupon the Court held that "neither the tenant without the license of the lord, nor the lord without the consent of the tenant, could dig in the copper mines in question." \*

Perhaps the best, because the simplest, definition of "Common" is that which is given in "*Cruise's Digest of the Laws of England*":—†

"Common is a right or privilege which one or more persons have, to take or use some part or portion of that which another person's lands, waters, woods, &c., produce. It commenced in some agree-

\* *Bishop of Winchester v. Knight*, 1 P. W., 406.

† Vol. III, Tit. 23, sec. 1.

ment between the lords of manors and their tenants, for valuable purposes ; and being continued by usage, is good and valid at present, though there be no deed or instrument in writing to prove the original grant."

Without defining the different kinds of common, known as either appendant, appurtenant, or in gross, it is sufficient to say that of those waste lands which are called commons, the property of the soil is generally in the lord of the manor, but "the lord of the manor, or other owner of the soil, in which there is a right of common, cannot exercise rights of ownership destructive of the commoners' rights." \*

It becomes therefore necessary to consider the definition of the word "Commoners," or those who are entitled to the rights of common.

"Copyholders," says the authority before quoted, "are not entitled by general custom to common on the wastes of the manor of which their estates are held ; but copyholders in fee or for life may, by particular custom, have common on the demesnes of the manor." †

Thus it becomes further necessary to distinguish between mere copyholders who are not entitled by general custom to rights of common, and copyholders in fee, or for life, who by particular custom are. This is the more important because, upon the authority of Lord Coke in the case of *Bagnall v. Tucker*, ‡ "the third part of the realm of England" at that time "consisted of copyholds." Mr. Justice Blackstone, in the second volume of his Commentaries, draws the conclusion, from authorities there cited, "that copyholders are in truth no other than villeins, who by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will. Sir Martin Wright gives his sanction to the opinion of the learned commentator in

\* *Ib.*, p. 78, sec. 47.

† *Ib.*, p. 71, sec. 36.

‡ 2 Brownlow's Reports.

his treatise, entitled, "An Introduction to the Law of Tenures." \* He thus concludes:—

"It following from the preceding account, if true, copyholds are no other than customary estates, after the ancient will of the first lords, as it is preserved and evidenced by the Rolls, or kept on foot by the constant and uninterrupted usages of the several manors wherein they lie."

The correctness of the above conclusions of Mr. Justice Blackstone and Sir Martin Wright was questioned by Lord Loughborough in the case of *Grant v. Astle*,† but was sanctioned by Lord Wynford in the case of *Garland v. Jekyl*.‡ So it appears that lawyers, like doctors, sometimes disagree. At all events a copyholder has, in judgment of law, but an estate at will, as has been recognised in numerous cases.§ But although copyhold estates are still, in judgment of law, held at the will of the lord, yet as successive lords have permitted those estates to be enjoyed by the tenants according to particular customs established in their respective manors, the will of the lord has long ceased to be arbitrary, and has become fixed and ascertained by the particular custom which had prevailed. Still there could originally have been no absolute right appendent to such a tenure. Copyholds may therefore be divided into two classes, or kinds. (1.) Ordinary copyholds which formerly were held, and are still expressed to be *held at the will* of the lord of the manor, according to the custom of the manor, by copy of court roll. These copyholders are *not* entitled by general custom to common on the wastes of the manor of which their lands are held. (2.) Free copyholds, or customary freeholds, which are *not held at the will* of the lord of the manor, but only according to the custom of the manor, by copy of court roll. These copyholders, whether in fee, or for life, may, by particular custom, have common on

\* 3rd Edit., p. 215. † 2 Doug., 724, n.

‡ 2 Bingham, 292.

§ 4 Coke, 21a, 126b. Co. Lit., 60a. Cro. Jac., 260. Willes, 325. 3 Burrows, 1543.

the demesnes of the manor. They are generally known as the freeholders of the manor, but it has long since been settled that though these tenures resemble freeholds in some respects, yet being held by copy of court roll, according to the customs of the manor, they are in truth but a superior kind of copyholds. The freehold is in the lord of the manor, and such customary freeholds being subject to the general law of copyholds may be termed free copyholds. To the court baron of the manor every *freehold tenant* was, and still is, obliged to do suit. These freeholders are the judges in this court, and are styled the homage. The court baron was the court of the frank-tenants, in which the villein tenant or base tenant could not appear. The lord therefore held another court for those persons who held of the manor by villein or base services, who were dependent on his will, or claimed merely by custom; and which therefore was called the villein or customary court. With a court-baron, as such, *ordinary copyholders* have therefore nothing to do—the *free* copyholders or customary freeholders, those who hold by frank tenure, alone constitute the court baron.\*

Such courts still exist, and it would appear from the authorities that at least two such freeholders are requisite to constitute the court. This point has been somewhat laboured, because where commonable rights are confined to the free-copyholders, which is the rule—the exception being the extension of such rights to the ordinary copyholder—those enjoying rights of common may happen to be very few, and this involves an important question, viz., to what extent the lord's right of inclosure may be exercised? By the Common Law, the lord of a manor could not appropriate to himself, by inclosure or otherwise, any part of his wastes in which his tenants enjoyed a right of common. But by the Statute of Merton, 20 Hen. III. c. 4, it was enacted that when any of the tenants of a manor brought an assize of *novel*

\* See Watkins on Copyholds, vol. II., p.p. 8 and 4.

*disseizin* for their common of pasture, and it was therein recognised by the justices that they had as much pasture as sufficed to their tenements, together with free egress and regress from their tenements unto the pasture, they should be contented therewith. This Statute related only to common appendant, or a right annexed to the possession of land within the manor, to feed beasts upon the wastes and upon the lands of other persons within the manor; but by the Statute of Westminster 2, c. 46, it was enacted that the Statute of Merton should bind neighbours, and such as claimed common of pasture appurtenant to their tenements, although lying without the manor. In a comparatively modern case it was held that the lord of the manor had no right, under the Statute of Merton, to inclose the wastes of the manor, where the tenants had a right to dig gravel on the waste or to take estovers there, *i.e.*, necessary wood for repairs in houses, and firing, and for repairing implements of husbandry, and also hedges or fences, but only where the tenant's rights were limited to pasturage.\* It has been held in another modern case in the Court of King's Bench, that the lord may, with the consent of the homage, grant part of the soil of the common for building, if such a right has been immemorially exercised;† and although the Statute of Merton limited the lord's right to inclose to cases where the tenant's rights of common related, in the words of the Statute, to *pastura et communia pasturæ*, it has since been decided that where commoners have some other right on the common besides that of pasture, as of digging sand, &c., the lord may notwithstanding inclose if he leave sufficient common of pasture, and if such inclosure be no interruption to the enjoyment of the other kind of common.‡

It was, however, laid down in a more recent case, that there can be no inclosure in derogation of a right to dig turf.§

\* *Duberley v. Page*, 2 Term Rep., 391.

† *Folkard v. Hemmett*, 5 T.R., 417, n.

‡ *Shakespeare v. Peppin*, 6 Term Rep., 741.

§ *Grant v. Gunner*, 1 Taunt., 435.



In many manors a custom prevails enabling the lord to grant portions of the waste lands by copy *with the assent of the homage*, or of a certain number of them. In the case of *Hughes v. Games*,\* such a custom was admitted to be good; but the consent of the homage of the customary court cannot bind the right of the free tenants who hold not at the will of the lord. At one time, if the lord had not a sufficient number of freemen or peers for the purpose of his court, he might have borrowed or hired a few of the lord paramount, or greater baron. However, such hired judges proved frequently refractory, and hence the practice declined. And, indeed, if any suitor were dissatisfied with the judgment of his peers, he might have appealed them; that is, he might have fought them; he might have dared them to the combat, and appealed to the decision of heaven. If he did not appeal till judgment was pronounced, he was obliged to fight the whole bench. Even now, the lord of a manor having inclosed part of a common, without the requisite consent, or without having left, under the Statute of Merton, sufficiency of common, might have to fight his commoners, as any one of them would be entitled by force to throw open the inclosures, *vi et armis*. No power can be supposed reserved to the lord at the time of the original grant (either at Common Law, or by virtue of the Statute of Merton), which would enable him to annihilate the right of common altogether, "such a custom," said Chief Justice Abbot, "cannot exist." †

The commoners, whether free copyholders or even ordinary copyholders, appear to be the persons entitled to rights of common, and the only way for the general public to participate in such rights, even in a modified degree, is by sheltering themselves behind the privileges of these commoners, for, strictly speaking, the public have no right to enter upon the waste at all, or to deviate from the public paths. In the event of an enclosure, even though an aggressive and illegal

\* See *Select Cases in Chancery*. Temp. King C., 62.

† *Badger v. Ford*, 3 Barn & Ald., 155.

one, the commoners are the only persons entitled to interfere or to resist the encroachment, but these difficulties are overcome by the formation of a body of trustees for the purpose of purchasing a sufficient number of free copyholds, with commonable rights attached, thus insuring the perpetuation of rights of common for the benefit of the neighbourhood, and indeed of the public generally. But energetic measures are essential to attain the object, for both customary and free tenants may be bought up, or an Inclosure Act may smooth many difficulties between the lord and his copyholders, whilst the public are neglecting an opportunity which, once lost, can never be redeemed, for if all the free copyholds escheat, or become forfeited, or *purchased by the lord*, the manor is properly at an end, and the rights of common extinguished.\*

By the 8 & 9 Vict. c. 118, entitled an "Act to facilitate the inclosure and improvement of Commons, &c.," it is provided:—

"That no waste land of any manor on which the tenants of such manor have rights of common, nor any land whatsoever, subject to rights of common, which may be exercised at all times of every year, and which shall not be limited by number or stint, shall be enclosed under this Act, without the previous authority of Parliament in each particular case, as hereinafter provided."

And further by the same Act it is provided:—

"That no lands situate within fifteen miles of the City of London, or within two miles of any city or town of ten thousand inhabitants, or within two miles and a half of any city or town of twenty thousand inhabitants, or within three miles of any city or town of thirty thousand inhabitants, or within three miles and a half of any city or town of seventy thousand inhabitants, or within four miles of any city or town of one hundred thousand inhabitants, shall be subject to be inclosed under the provisions of this Act, without the previous authority of Parliament in each particular case, as hereinafter provided."

\* Watkin, vol. I., p. 27. Cruise 3, Tit. 23, p. 81.

And it is further provided:—

“That no town, green, or village green, shall be subject to be inclosed under this Act.” And “the persons interested in land subject to be inclosed under this Act, or otherwise subject, or to become subject to the provisions of this Act, shall be deemed to be the persons who shall be in the actual possession or enjoyment of any such land or any part thereof, or any common or common right thereon, or any manor of which any part thereof shall be waste, or who shall be in the actual receipt of the profits of such common, or common right, or manor respectively (except any tenant for life, or lives, or for years, holding under a lease or agreement for a lease, on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease, or agreement for a lease, for a term which shall not have exceeded fourteen years from the commencement thereof, and except any tenant from year to year at will or sufferance,) and that without regard to the real amount of interest of such person; and in every case in which any such land, common, or common right, or manor, shall have been leased, or agreed to be leased, to any person, or persons, for life, or lives, or for years, by any lease, or agreement for a lease, on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and in every case in which any such land, common, or common right, or manor, shall be in the possession of a tenant from year to year, at will or sufferance, or shall have been leased, or agreed to be leased, for a term which shall not have exceeded fourteen years from the commencement thereof, the person who shall for the time being be entitled to the said land, common, or common right, or manor, in reversion immediately expectant on the term created, or agreed to be created, by such lease or agreement for a lease respectively, or subject to the tenancy from year to year, at will or sufferance, shall be deemed for the purposes of this Act to be the person interested as aforesaid, in respect of such land, common, or common right, or manor; and in every case in which any such land, common, or common right, or manor as aforesaid, shall have been leased, or agreed to be leased, to any person for any life, or lives, or for years, by any lease, or agree-

ment for a lease, in which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease, or agreement for a lease, shall, jointly with the person who shall be liable to the payment of such rent of such land, common, or common right, or manor, be deemed for the purposes of this Act to be the person interested in respect of such land, common, or common right, or manor respectively; and in every case in which any person shall be in possession, or enjoyment, or receipt of the rents or profits of any such land, common, or common right, or manor, under any sequestration, extent, elegit, or other writ of execution, or as receiver under any order of a Court of Equity, the person who but for such writ or order would have been in possession, enjoyment, or receipt of the rents and profits, shall, jointly with the person in possession, enjoyment, or receipt by virtue of such writ or order, be deemed for the purposes of this Act to be the person interested in respect of such land, common, or common right, or manor, respectively."

With this quotation we conclude the subject.

#### ART. VI.—THE SCOTTISH BENCH.—THE RECENT VACANCIES BY DEATH.

**T**HERE is something peculiarly classic in the nomenclature of the supreme judicial establishment of the northern section of our United Kingdoms. The whole collective body connected with the administration of law there is known as the *College of Justice*. This includes not merely the judges, who are styled *the senators*, but the clerks of court, the advocates and attorneys, as if to proclaim that all grades of the profession are knit together in one great confederation, with one grand aim and object—the administration of

justice. The motto of such a popularly constituted tribunal might appropriately be that of the Justinian Code—*Salus Populi Suprema Lex*. Scotland having longer and closer intercourse with France, than its then antagonist England, borrowed in 1537, under James V., the frame of its courts from the Parliament of Paris. The senators of the College were formerly *fifteen* in number, but strange to say, with the great increase of business they were recently reduced to *thirteen*. It was a curious fact, that whilst England had her *twelve* judges, her jury had the same number, whilst Scotland with her *fifteen* judges had, and still in criminal cases has, the like number of jurors. The youngest appointed judge acts as a sort of judicial janitor, holding the keys of justice, and, under the strange name of “Lord Ordinary on the Bills,” he gives or refuses admission to all applicants seeking immediate redress under the term *Interdict*, answering to our *Injunction*. The remaining apostolic twelve are divided into judges of the Outer and Inner House. The Inner House again is partitioned into two apartments of co-ordinate jurisdiction, one called the *First Division*, presided over by the *Lord President or Justice General*, and the other the *Second Division*, by the “*Lord Justice Clerk*,” who takes this queer name from his *status* in ancient times as *clerk* to the hereditary Lord Justiciar, and in modern times he is second in the criminal or justiciary court. A judge on his appointment undergoes the truly ridiculous farce of trying a couple of cases under the title of *Lord Probationer*. His trials receiving the mock approval of his future brethren, he takes his seat like the Scripture judges in *the Gate*, and for a season is heard of in the porch known as the *Bill Chamber*. He assumes the lordly name of any estate he may have, or may borrow the title from some relative, and whilst passing under some historic title, often akin to hereditary nobility, his wife is known only as Mrs. It is strange that the Scotch judges do not claim the privilege conceded to those of England of being knighted, and thus placing their



spouses on somewhat of the same platform. When the appointed judge is acreless, he is content to be recognised by his plain surname but with the lordly prefix. When a vacancy occurs, after having thus served his judicial apprenticeship, he steps from the doorway to the Outer House, and reaches the Inner House by regular gradation, unless when by a somersault he is (as is sometimes the case) politically pitched over the heads of his seniors, alike in years as in service. The judges in the Outer House may fitly be denominated the *Dii minores*, and the four within the penetralia of each Inner House the *Dii majores* of this Temple of Themis.

With this brief outline, not altogether unnecessary for southern jurists, we shall notice the recent deaths of four distinguished ornaments of the northern judicature—senators of the College of Justice.

LORD JUSTICE CLERK PATTON.

George Patton was born in Perth, in the year 1803. His father was long the much respected county and sheriff clerk of that shire, and was succeeded in office by his eldest son, James Murray Patton. The family were an old county family, and had extensive properties in the picturesque region of Glenalmond. Whilst the political franchise was limited to a high value of heritage according to an ancient reckoning of money, the family had much political influence, finally dissipated by the first Reform Act of 1832. After receiving his primary education at the famed Academy of Perth, the subject of our notice finished with honours in the University of Cambridge, where he was distinguished especially by his powers of oratory. He passed to the Bar of Scotland in 1828.\* He was soon

\* Mr. Patton passed on the same day as the present Lord Deas and James Anderson, the well-known Queen's Counsel. An amusing anecdote is related of the ceremony. The aspirants were individually called in to be examined before the Faculty. Mr. Patton with his characteristic simplicity appeared in undress, with a frock coat, which to the last was his favourite garb. This being against all rule and etiquette, the janitor positively refused admission to the novice. In these circumstances Mr. Anderson, having passed the ordeal, changed

largely employed as junior counsel. He distinguished himself in many cases by great industry and perseverance. When in a case before the Court, the judges took umbrage at the chief magistrate of his native city being designated Lord Provost, he with much research and talent produced such an array of historical authority as compelled the Court to yield the point, and thus, what few cities can boast, the high sounding title to this northern city was for ever fixed by judicial sanction. Mr. Patton showed great familiarity with English case-law, his pleadings and decisions often took others by surprise, through his ready reference to analogous cases in our courts to the *Law Merchant*, which the Tweed is no rubicon to limit. In the war of railways the same indomitable perseverance, and readiness to face any array of figures and calculations, always found him in the front of the attacking or defending party. But his mind was not fitted to run continuously in the dry grooves of legal lore, or in the study of black letter. He sustained his scholarship ever fresh with an increasing acquaintance with modern languages. He felt intensely for the high and right education of the people.

A few months before his mournful death, he presided at a competitive trial of the several parochial schools connected with his estates, and distributed prizes to the most deserving. To carry out this idea of a competition between *schools* rather than *scholars*, he bequeathed a sum for the like annual exhibition on a much more extended sphere of locality, and his trustees have already advertised the first series of this educational *stimulus*. He was besides an ardent student of natural history, especially in the field of arborescence. The *Coniferae*, or fir tribe, was his favourite. On his estates the finest specimens of these were cultivated, some varieties of which we believe appropriately bear his name. With the view of improving public taste in the useful arts, he inaugurated two exhibitions of manufacture with his friend, and Mr. Patton was admitted under the *coverture* of his friend's upper garment. There appeared in this a mutual interchange of the mantle of inspiration.

tures in Edinburgh, and we are not sure but this was the germ from which sprung that great repertory of the arts, "The Industrial Museum." He held the office of Solicitor-General for a brief period in 1859, and was appointed Lord Advocate in 1866. He obtained a seat in Parliament for the now notorious borough of Bridgewater, first by the narrow majority of seven votes, but on a second attempt he lost his seat by an adverse vote of thirty-seven. During the time he held the high office of Lord Advocate (which combines the functions of Attorney-General with Secretary of State, as well as those of the Lord Chancellor, in distributing civil and ecclesiastical offices), he was held in high favour for his great courtesy in receiving the constant infliction of deputations on every conceivable grievance and fanciful project. He successfully introduced several important legislative measures, which his talented successor, Mr. Gordon, perfected.

In 1867 he was appointed to the office of Lord Justice Clerk, and consequently to the Chair of the Second Division, under the title of *Lord Glenalmond*. His father partitioned three conterminous estates in the Glen amongst his three sons. The eastern portion, called the Cairnies, he bequeathed to the youngest son, the subject of this sketch. The middle and largest, Glenalmond, was left to the eldest son, James; and the western fell to the second son, Thomas, a writer to the *Signet*, who succeeded to Glenalmond on the death of his brother James. George took the honorary title, as it were prophetically, of *Glenalmond*, when he ascended the Bench. In the summer of 1869 his brother died suddenly whilst shooting in the field, and thus the whole three estates became united in the person of the judge, whose tenure of possession was to be sadly brief. By a singular mistake in the newspapers, the death of the Justice Clerk was noticed instead of that of his brother, and, as was the case with Lord Brougham, he had the rare privilege of perusing the notice of his own death, with the public opinion of his character. This event, a short space before his own

death, it is said, had a very saddening effect on his very sensitive mind, and perhaps had no small share in hastening the painful event connected with his own demise.

He married Miss Margaret Bethune, a lady of ancient family, in the neighbouring county of Fife, or "kingdom," as its inhabitants honourably designate the peninsula between the Firths of Forth and Tay, with its ancient Palace of Falkland midway. He has left no family to perpetuate his honours, and succeed to his domains.

In the summer of 1869 the Parliamentary inquiry into the successive misdeeds of the electors of Bridgewater was instituted. The judge was subpoenaed as a witness. It was well known that he had nothing to conceal in the matter, and no guilt to confess. It is believed that the inquiry, since his mournful death, has completely established his entire innocence. But the mere fact of a judge of the realm being suspected of offending in any degree its laws preyed on his highly honourable mind. The advice of judicious friends occasionally calmed for a brief period the troubled mind, but soon the dark cloud returned to obscure these passing glimpses of sunshine. A very few days before his death he presided with his usual calm demeanour at the circuit or assizes at Ayr, and with his wonted courtesy at the circuit dinner after the labours of the day. But hastily he formed the resolution of no further prosecuting the remainder of the circuit. He sought repose in his lovely retreat at Glenalmond. But, alas, the very objects which had often attracted his fond attention, and on which his hands had laboured to make still more attractive, gave him now no longer solace and comfort. Had he the nerve of a Prince Royal, and boldly appeared to testify to his innocence, the subject of our memoir might have still, and for many years to come, graced his high position on the Judicial Bench.

On Sabbath, September 19, 1869, he, as was customary, attended his parish church at Monzie. Next morning he

calmly went out to take his accustomed walk amongst his dumb friends of the forest. He never returned. A dismal mystery for many days hung over his disappearance, but at length a dark and deep pool on the river Almond revealed the remainder of the sad tale, and closed the life history of a most amiable gentleman, accomplished scholar, and upright judge.

#### LORD MACKENZIE.

Thomas Mackenzie was a native of the same city (Perth) as the Lord Justice Clerk Patton. He was born in April, 1807, and died a few days after his distinguished townsman Mr. Mackenzie received his elementary education in the Perth Academy, which was completed in the College of St. Andrews. He became a member of the Faculty of Advocates in 1832. He filled the office of Sheriff of Ross-shire for some years, was appointed Solicitor-General in 1854, and elevated to the Bench in 1855. He was a ripe scholar, and his tastes were much in sympathy with the elegant mind of Lord Rutherford, whose friendship he long enjoyed. At the Bar he was distinguished for clear exposition and grasp of mind. As a Chamber counsel in giving opinions on all the branches of law, he was held in high repute. He was of rather slender body, and the excessive labour he underwent while at the Bar, nowise abated by his judicial duties, speedily produced symptoms of frailty, and he was at last, to the regret of the profession, obliged to resign in 1864. He returned to private life, and after a few years of peaceful quietude, he silently passed away on September 26, 1869. He has left an unperishable monument in his great work, "*Studies in Roman Law, with Comparative Views of the Laws of France, England, and Scotland.*" The first edition appeared in 1862, and a second edition was called for in 1865. The book has been received as a text-book on civil law in most of the Universities of England and America. It is an evidence of the vast resources of learning possessed by the lamented judge, but it



is still more the earnest of greater success he was able to accomplish had his active powers been longer spared. He was the second Scotch judge of the same name. The first, was Henry Mackenzie, son of Henry Mackenzie, an attorney in the Scotch Exchequer, and widely known as "the Man of Feeling," from being the author of that little *dilettante* work, when works of fiction were vastly limited from what they now are." He was an eminent civil and criminal judge, and adorned the Bench for the long period between 1822 to 1851. It is worthy of notice that recently we have got a third Scotch judge of the same name promoted to the Bench; Donald Mackenzie, Sheriff of Fifeshire, is now the Lord Mackenzie of the day. The periods of their several dynasties are not so far removed as not to render it possible, without close attention to dates, to mistake the dicta and the ruling of one judge for that of another.\*

One instance of the great industry of the subject of this notice is of a very curious kind. The rule for regulating the division of rents between heir and executor in Scotland is made dependent on survivorship over the half-yearly terms of Whitsunday and Martinmas. In England a series of Statutes provided for another mode of apportionment, according to the day of death. These Statutes were amended by the Act 4 & 5 Will. IV. c. 22 (1834), which was clearly, as shown by its terminology, like its predecessors, intended to be confined to England, and was so set down in the general index. In the first clause, however, it extended the Act so as to reach *effects* situated in Great Britain. The profession generally understood the Act not to extend to persons dying in Scotland, and thousands of pounds were paid according to the ancient law. Mr. Mackenzie at length discovered that the

\* We are alone indebted to a slight difference in orthography for distinguishing an English from a Scotch Judge of the present day. Gifford and Giffard sound much the same, as did the English Eldon and the Scotch Eldin some forty years ago, when the last-named witty judge maintained that the difference was, "all in his eye."—(i.) Since this note was in type the eminent English Judge has died.

Act might be made to apply to Scotland, and the question was first raised ten years after the Statute. The Court with some difficulty by a majority adopted his view, and it has since been acted upon (March 7, 1844, Fordyce, 16 *Jurist*, 428; affirmed in the House of Lords, February 23, 1847, 19 *Jurist*, 322). Amongst the last cases decided by his Lordship, was a case with the Crown as to the property of part of the ancient Palace of Dunfermline. Lord Mackenzie visited the ruins, and issued a most elaborate judgment in favour of the Crown. The Inner House by a majority recalled the judgment of the Lord Ordinary, but the House of Lords returned to the judgment of Lord Mackenzie.\*

EDWARD F. MAITLAND, LL.D., LORD BARCAPLE.

This amiable gentleman, most industrious advocate and laborious and distinguished judge, died on Wednesday, February 23, 1870. He was called to the Bar in 1831, and for a brief period he held the office of Solicitor General, and was most deservedly promoted to the Bench in 1862. An elder brother, Thomas Maitland, had previously occupied a seat on the same Bench, under the title of Lord Dundrennan, and was distinguished by his great judicial ability. He was promoted to the Bench on February 7, 1850, and was also made a Lord of Justiciary. After a brief but distinguished career of less than eighteen months, he died very suddenly on June 10, 1851. The subject of this brief memoir was much respected for his minute knowledge of law and his laborious research into precedents. Whilst extensively employed at the Bar, he was chiefly esteemed as a Chamber counsel. His opinions always bore unmistakable marks of great pains and caution, and were expressed in clear language, and not in the oracular style often had recourse to whereby the response may be read in a double sense, leaving the client in doubt, but saving the credit of the adviser. The eminence of Lord Barcaple as a judge resulted in his

\* *Hunt v. The Lord Advocate*, 39 *Jurist*, 248.

Rolls becoming so large, that no man with ordinary physical and mental power could overtake them. A recent enactment threw on the Lords Ordinary the further duty of taking proofs in cases of disputed fact. This mode of trial was greatly preferred by our northern neighbours to trial by jury, which, as an exotic recently transplanted into their land, has never taken deep root or flourished. Lord Barcaple had the peculiar temperament for this new mode of trial, uniting the diversified balance of mind to be found, or at least expected, in the jury-box in combination with the clear recognition of legal principle which distinguished the Judge.

From this continual strain of work, often of a mechanical or technical nature, throughout the day, with the additional preparatory and subsequent study of cases in the afternoon, it is well known that vacation was to his Lordship an empty name. After the Court ostensibly rose for the so-called recess his lordship's roll of proofs extended over a space nearly touching the next session of the Court. In addition to all this proper judicial labour, Lord Barcaple was named one of the Commissioners on Law Courts. From the numerous meetings of this body he was seldom absent, unless prevented by his engagements in Court. The three blue volumes already issued by the Commission bear evidence of his presence by the searching series of interrogatories, often showing that his lordship practically knew much more of the subject than the witness who was brought to give the desired information. No amount of strength could long sustain this continued and ever increasing strain. His lordship at length, with reluctance, was compelled to seek repose at home, but the antidote came too late. He gradually grew weaker, and at length, within a few weeks after his retirement from active life, he died, as he had ever lived, in perfect peace with all mankind.

#### LORD MANOR.

George Dundas was third son of James Dundas, of Ochter-

tyre, in the west of Perthshire, and a well-known writer to the *Signet* in Edinburgh. The father was representative of the ancient family of Dundas, of Manor, in Clackmananshire. George was born in 1802. He received his primary education in the celebrated High School of Edinburgh, then under the preceptorship of Carson and Pillans. He studied in the College of Glasgow, and finally at Balliol College, Oxford. He there received the character of high scholarship, which he maintained to the last. In conjunction with Lord Rutherford he gave an edition of "Gauan Douglas's Virgil" for the Bannatyne Club.

The University of Edinburgh deservedly conferred on him the degree of Doctor of Laws. He was called to the Bar in 1826. He was not well fitted for the bustle of the Bar, but few excelled him in the preparation of written pleadings. These were at once models of elegant writing and forensic pleading. He became Sheriff of Selkirkshire in 1845, and Vice-Dean of the Faculty of Advocates in 1855. In 1868 he was promoted to the Bench, and took the title of the ancient patrimonial estate. He died very suddenly on October 7, 1869. His judicial career thus extended only a few days beyond the year. He never got without the province of Junior Lord Ordinary, discharging the irksome and continuous duties of the Bill Chamber. During the brief period that he occupied a niche in the Supreme Judicature, and the much longer period he distinguished himself as a County Judge, he gave satisfactory evidence of possessing in a high degree all the qualifications which make the sound lawyer, and the discriminating judge. It is well worthy of consideration as exemplified in the instances of the few judges whose judicial lives we have now sketched, and especially those of Lords Barcable and Manor, whether it is wise to delay placing gentlemen on the Bench until age has begun to quench the vigour of manhood; when the new path of life, with its incessant call to labour, accompanied by the intense sense of responsibility, may be expected to produce an

early paralysis and collapse of physical and mental force. It is well understood that the salaries of the supreme judges in Scotland are on a scale so very low, as often to obtain a declinature from Advocates in first-rate, and, therefore, really remunerative, practice, to accept promotions to the Bench, until they have greatly impaired their abilities by hard work at the Bar, so as to obtain an income with which they might be able to uphold the dignity of the Supreme Bench, which the salaries attached thereto are wholly inadequate to sustain. No economy can be more hazardous to the highest interests of the country. Nothing enlists the attachment of the people to Government more than the pure and right administration of law, by judges of the highest eminence that can be obtained; whilst the reverse, even on suspicion,\* is the fruitful parent of discontent and disaffection.

#### ART. VII.—ACADEMIC DISCIPLINE OF THE INNS OF COURT AND OF CHANCERY.\*

**P**RIOR to the reign of Edward I., all the learning of the country was engrossed and absorbed by the clergy. The law offices were filled by them. They were the judges, the counsel, and the attorneys. Hence the old expressive adage, "*Clericus semper causidicus*;" intimating that in the dark ages the pastor of the flock invariably combined with his sacred duties a mundane occupation.

As might have been expected, the clergy fell into discredit

\* What relates to the early history and Discipline of the Inns—is taken from a lecture, now out of print, delivered in 1851, before the Benchers of Lincoln's-Inn, by a Barrister of the Society.



by their practice in the law. They were consequently interdicted from it by a general ecclesiastical canon in the reign of Henry III.

The exclusion of the clergy from the legal profession was a change not at first beneficial to the community, but very much the contrary. The bulk of the laity were lost in barbarism and superstition. The field, therefore, previously cultivated by men of learning and ability, was now thrown open to ignorant pretenders, who very soon taught the people to remember with regret their more competent, if not more scrupulous, predecessors, the clergy.

The illiterate practitioners who succeeded the clergy out did their delinquencies. The Chronicles of Edward I. present a frightful picture of corruption, pervading all ranks of the legal profession. The discontent incident to such a state of things was enormous and universal. The great monarch who then occupied the English throne did not turn a deaf ear to the complaints and clamours of the nation.\* In the eighteenth year of his glorious reign he issued a Commission of Inquiry and Redress. The Commissioners were worthy of the master who employed them. The chief was the founder of the honourable society of Lincoln's Inn—Henry de Lacy, Earl of Lincoln—one of the greatest men of his age—the personal friend of Edward I.—his principal minister—and the head of his nobility. The second commissioner was Burnell, an excellent Chancellor, rescued by Lord Campbell from oblivion.†

That the Commissioners instituted a very searching investigation, history tells us; and we may rest well assured that their report proved startling and convincing.

In the following year—the year 1292—a strong representation was made to Parliament of the corruption and venality which then prevailed in the legal offices.

With two honourable exceptions, all the Common Law judges

\* “*Clamor miserorum venit ad Regem.*”—Dunstaple Chron., Ed. by Hearne.

† Whittaker's Whalley, 179.

presiding in the Courts at Westminster, were convicted of taking bribes and falsifying records. The unworthy magistrates who thus brought disgrace upon the ermine, were speedily degraded and removed; but there must have been great difficulty in finding their successors; for they could not have been chosen from the clergy, and the laity were still less likely to supply them.

It was under these circumstances that Edward I., *with the sanction of Parliament*, issued a *second* Commission, which was addressed to the Chief Justice of the Court of Common Pleas, John de Mettingham (one of the two exceptional, untainted judges), authorising him, in conjunction with his colleagues, to look out for, provide and appoint, *from every county*, a certain number of attorneys to practise in the courts, and a certain number of pupils to study the Common Law and secure its continuance.\*

The Commission suggested that 140 attorneys might suffice for the purpose in view. But power was granted to increase or diminish the number; as the justices in their wisdom should see fit; and it was declared that the persons to be thus chosen by the justices, *and those only*, should attend the courts, and conduct the business of the King's subjects therein.

The only persons spoken of as constituting the legal profession at this remote period, are the justices to whom the Commission was addressed, and the attorneys† and students who were the subjects of it.

In the Commission the students are styled *apprentici libentes addiscere*; that is, persons who had learnt something of law, and were willing and apt to learn more. The end sought to be attained was the cultivation of the Common Law, in contradistinction to the civil and ecclesiastical, then

\* Byley's Pla. Par., 104.

† The attorneys were those who had come into action in place of the clergy. At this period there were no barristers. Hence the chief legal adviser of the Crown was called the Attorney-General;—the title he still retains.

supposed to be sufficiently taught in the two learned Universities of Oxford and Cambridge. In other words, the King and his ministry were minded to rear up a race of *lay* candidates for the forum, to fill the place of the spiritual competitors now irrevocably banished from the secular tribunals.

Accordingly, Sir William Dugdale affirms that very shortly after the issuing of this memorable Parliamentary Commission, a colony of common lawyers, including both practitioners and students, was planted in that region which has ever since been occupied by our Legal University.

The justices selected the nominees; but the Government must have found the accommodation; and we cannot doubt that this was done by the authority and under the superintendence of the King's chief ministers, Henry de Lacy and Lord Chancellor Burnell.

In the reign of Edward I., and long before—the Masters and subordinate functionaries of the Court of Chancery resided, and had their offices, in certain hostelries called *Inns of Chancery*, lying between Fleet Street and Holborn; and in these were placed the attorneys and *apprenticii* chosen by the justices.

Towards the close of the reign of Edward I., or in the very beginning of that of Edward II., Henry de Lacy, the great baron of Lincoln—a man who, in addition to other splendid qualities, was celebrated for munificence—surrendered his town mansion with its accompanying advantages in Chancery Lane to a body of Common Law professors and their disciples. This fraternity took their name from the title of their founder, and were known, and have ever since been distinguished, as the Honourable Society of Lincoln's Inn,—the first and the oldest Inn of Court.\*

In the reign of Edward III., we are told that the legal *apprenticii* of Thavies' Inn, one of the ancient Inns of Chancery, finding the accommodation of that place too narrow for

\* Thynne, a very learned antiquary, (praised by Camden,) writing—*temp. Eliz.*—calls Lincoln's Inn the “ancientest House of Court, before the Temple.”

for their augmented numbers, accepted from the Hospital Knights a lease of the Temple; and here we have the origin—not quite so remote as commonly imagined—of those two great Inns of Court, the Inner Temple and the Middle Temple.

The origin of Gray's Inn, the fourth Inn of Court, is simply, that in the same reign, the reign of Edward III., Lord Grey de Wilton granted to another corps of legal *apprenticii* a lease of his hostelry in Holborn.

The fraternities, thus furnished with more capacious habitations, did not relinquish their former dwellings, the Inns of Chancery; but assigned them as places of residence and education for the younger *apprenticii*; reserving their new domiciles, the Inns of Court, as head-quarters for the accommodation of the Governors, the Senior Fellows, and higher order of students.

All these bodies proceeded in accordance with one uniform scheme, and that scheme was collegiate; each of the greater Houses, the Inns of Court, (by which I mean Lincoln's Inn, the Temple, and Gray's Inn,) had two subordinate Inns of Chancery,—filled with their pupils, and taught by their instructors.

What progress they made during the long reign of Edward III. must remain a speculation; but it is probable they flourished under the dominion of a Prince, whose domestic government was even more admirable than all his foreign victories. In Henry IV.'s time they had not only acquired a settled constitution and an academic discipline, but the men turned out by them proved generally the most eminent of the nation.

Some writers have indeed attempted to carry back the history of these societies to a period much earlier than that of Edward I. The granting of Magna Charta, and the giving a fixity of tenure to the Court of Common Pleas, are the circumstances usually represented as having produced, what

Blackstone calls, "a lucky assemblage of Common Law professors" in the reign of Henry III. This fanciful suggestion we stop not to investigate, reposing, as we do, with all confidence, on the learned and cautious Dugdale, who refers the origin of the Legal Inns exclusively to the Parliamentary Commission of Edward I.

These associations, therefore, are not quite so old as Blackstone's summary might lead us to imagine. They sprang up at a time when the law of this country was cultivated under the fostering care of our English Justinian; and their institution, after all, is but a gleam of that light which preceded the full morning, when letters were revived, and the sciences pursued with the ardour of a new passion in the fifteenth century.

Another misapprehension of greater importance is fallen into by Blackstone. He represents these Inns as so many accidental clubs, or companies, formed by private compact, and liable to disunion at the volition of the parties;—forgetting that they are pronounced *Universities* by those profound lawyers, Chief-Justice Fortescue and Sir Edward Coke; the one writing in the fifteenth century, the other in the seventeenth.

In 1402, the author of the famous Panegyric on the Laws of England, Chief-Justice (or, as he is sometimes called, Lord Chancellor) Fortescue, became a member of Lincoln's Inn; and to him we are indebted for an account of the Inns of Court, and of the Inns of Chancery, as they existed upwards of four centuries ago. The Treatise "*De Laudibus Legum Angliæ*" was written about the year 1464. The most valuable portion of it, in our esteem, is that which relates to what he calls the Legal University; and we have only to regret that this portion is so short. He tells us that the Inns consisted of two sorts of collegiate houses; one called Inns of Chancery, in which the younger students of the law were usually placed, "learning and studying," says he, "the



originals and, as it were, the elements and principles of the law; who profiting therein as they grew to ripeness, so were they then admitted to the greater Inns of the same study, called Inns of Court. And in these Inns of both kinds the barons and knights, with other grandees and noblemen of the kingdom, were accustomed to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice." He then adds, that about 2000 students frequented these several Inns, equal (according to Lord Brougham's calculation) to 10,000 in the present day; and by far the greater number of them were of high families, *Filii Nobilium*, or gentlemen born.

Fortescue does not explain the mode of study pursued in the Inns of Court, or in the Inns of Chancery.

He is likewise silent as to their internal constitution and government. But we learn from other sources that the *apprenticii*, or scholars, were divided into three distinct classes.

To begin, then, with the junior class. This embraced the students or noviciates of the house, who, not being competent to give instruction, were content to receive it.

The next or second class of *apprenticii* were those who conducted the educational exercises prescribed.

The third, or senior class, were the *apprenticii ad legem*, who, from their standing and acquirements, were allowed by the judges to practice as advocates.

The generic term, *apprenticius*, or scholar, applied equally to *all*; and this threefold division is as old as the time of Richard II.

In the Tudor reigns, when for all ordinary purposes the English language came to be employed, the term *apprenticius* began to disappear, and that of *barrister* was substituted in its stead, though with a more limited signification.

The word *barrister* was not derived from the bar of a court of justice, as commonly supposed, but from the bar, or

rostrum, at which exercises were performed in the hall of the society.

There were two sorts of barristers, the *junior* and the *senior*. The juniors were barristers of the society—mere academics. The seniors, on the other hand, were barristers *at law*, allowed by the Courts to practise as advocates.

Thus it would appear that the degree or status of a barrister was not originally or necessarily *forensic*.\*

When, however, it received the judicial sanction, then it became *forensic*; and then, but not before, the barrister of the Inn, the simple academic, became a barrister-at-law—a public and juridical functionary, entitled to pre-audience in all our courts of justice.

It has been said, and said by high authority,† that in calling to the Bar; the Governors of the Inns of Court acted under a delegation of power from the judges. But it would appear that they acted *ex proprio vigore*. Their degree was academic, not forensic. The judges stood on separate ground, and exercised a distinct function. It was the judge's province to determine whether the academic of the Inn should become an advocate of the Court.

In ancient times—that is, down to the seventeenth century—the call to the Bar was not by the Governors or Benchers, but by the Reader of the Inn; who examined the candidates, and advanced or kept them back according to their deserts. The judges in general paid regard to the certificate implied in the call; because the call was not a matter of course, but involved investigation. When the judges surmised that the call was a mere formality they refused to recognise it, and thus all mischief to the public was easily prevented. But this is a very different thing from saying that the benchers,

\* The words of the Call are still, "I proclaim you a Barrister of this Society."

† Common Law Comrs. 1832. See *Rees v. Grays Inn*, Dougl. 389, where Lord Mansfield, citing Dugdale, says—"All the power of the Inns of Court concerning admission to the Bar is delegated to them from the Judges."

or the readers, acted as agents of the judges ; they acted by their own authority.

The preparation required to qualify for the Bar was in the days of our forefathers more protracted than at present. The young student who had left the University of Oxford or Cambridge was first entered at an Inn of Chancery, where he worked for two years in getting up what was considered the rudimental parts of the law. He then ascended to an Inn of Court,\* and there his first endeavour was to cultivate the art of *bolting*,—a strange name for an intellectual operation,—which consisted of conversational arguments upon cases and questions put to him by a bencher and two barristers sitting as his judges in private. He afterwards,—that is on becoming an expert bolter—was admitted to the *mootings*, or public disputations of the Fellows ; and at the end of some four or five years was made a junior barrister. When of eight years' standing on the books of the Upper House, he became a senior or *utter* barrister ; and then was opened to him the place of Reader to one of the Inns of Chancery. But he was not suffered to practise in Court till a further term of three years had expired ; in other words, not until he had for eleven long years studied the law and conformed to the discipline. Indeed, it was ordered by command of the judges in the first of Elizabeth, that no barrister should presume to plead in Court until he was of twelve years' standing as a legal academic ; so that few could hope to begin practice under thirty years of age.

Each academic advancement was preceded by examinations, jealously conducted, because all were contesting for prizes which only a few could obtain.

To great academic services, to distinguished talents, or to extraordinary acquirements, the steps of promotion were accelerated : as, for example, to Sir Edward Coke, who was

\* Sir Thomas More followed this precise course. He was two years in an inferior Inn before coming to Lincoln's Inn, of which he proved so distinguished a member.

made a barrister after, we think, but *six* years' study. Thus, the man of knowledge and capacity was *marked* in the Inn; and enjoyed to some extent even a public reputation.

Whether the attorneys ever properly belonged to the Inns of Court, it seems difficult to determine. As matter of *right*, it would rather appear that they did *not*; for we find some entries stating that they were admitted *ex gratiâ*. There are several orders for their exclusion. One, in particular, in the reign of Philip and Mary, expresses the concurrent resolution of all the four Houses of Court, that no attorney should be received in the superior Inns; the order laying it down as an universal regulation, "that if any member of an Inn of Court should practice 'Attorneyship,' he should, *ipso facto*, be dismissed the Society; with liberty, however, to repair to the Inn of Chancery from whence he had come." This order suggests a solution of the change which ultimately took place in the character and working of these *lower* seats of learning. For, whereas, in the days of Fortescue, they were the receptacles of the young nobility and gentry, we shall find that in the seventeenth century the resort to them was exclusively confined to legal practitioners. Hence, Lord Campbell tells us, that the great luminary of the law, Sir Matthew Hale, was admitted a student of Lincoln's Inn, without having previously belonged to any of the Inns of Chancery; "these establishments having been by this time," says his Lordship, "entirely abandoned to the attorneys."\*

By this time therefore had been consummated that signal professional segregation which has lasted ever since; a segregation lauded by some, but regarded by others as carried too far.

Here however a grave question arises—what has become of these Inns of Chancery? In 6 Chas. I. the judges ordered that they "should hold their government subordinately to the Inns of Court to which they belonged." The benchers were moreover required "to cause the Inns of Chancery to be examined in order that there might be a competent number of chambers

\* *Lives of the Chief Justices*, vol. 1, p. 515.

for students; and that once a year an exact survey should be taken to ascertain that the chambers allotted for that purpose were accordingly so employed." We cannot doubt that the attorneys will be prepared to meet this investigation; but we have never heard of their having set apart "Chambers for Students," nor are we aware that the benchers have ever done anything to enforce that requirement.

What evidence may be contained in the old records of the Upper and Lower Houses we are not able to offer even a conjecture. Sir William Dugdale obtained access to their repositories in the seventeenth century, and published the extracts made by him with comments interspersed. His book—the "*Origines Juridiciales*"—is very imperfect; a mere compilation, or rather jumble; entirely without method or order, and full of perplexing obscurities. But that it is accurate so far as it goes, and so far as it is intelligible, we cannot doubt: the high character and learned labours of the author having secured for him the respect of his own time—the reverence and gratitude of posterity.

From Dugdale's researches, it would seem that the Governors of Lincoln's Inn began before the others to preserve regular entries of their proceedings—one of the first citations from the "Lincoln's Inn Register" consisting of a long column of Readers, at the head of which stands the forgotten name of William Huddesfield, who appears to have lectured in the Hall of this Society just about the time when Fortescue's Panegyric was composed. The list of Readers of the Middle Temple begins in the seventeenth year of Henry VII. The list of the Inner Temple in the twenty-second of Henry VII. And the list of Gray's Inn in the fifth of Henry VIII. From this it would appear that Lincoln's Inn was the first of these Societies which had a settled government.\*

\* The "*Black Book*" of Lincoln's Inn is the oldest existing record of any Inn of Court. It commences in 1423; and is continued under the same title to the present day.



The fullest account is of the *Middle Temple*. Dugdale was a member of it; and he describes minutely, though obscurely, its method of teaching and its degrees.

The two Societies of the Temple were originally *one* body. Why or when they separated we know not. Down to the Reformation they were tenants of the hospital knights. On the dissolution of religious houses, they became tenants of the Crown. And in 1609, King James, who loved the law, and desired its improvement, converted their precarious leasehold tenure into an absolute right in perpetuity, "*upon trust for the reception and education of the professors and students of the laws of this realm.*"

The Middle Temple consisted, and perhaps still consists, of benchers, readers, cupboard-men, barristers, and students. The benchers were the governors; the readers the lecturers; the cupboard-men, a superior order of *disputants*, deriving their name from the *cupboard*, which, during exercises, stood in the centre of the Hall, and was used as a sort of tribune for the convenience of speakers.

The benchers were chosen from the readers; the readers from the cupboard-men; the cupboard-men from the barristers; and the barristers from the students.

For the purpose of educational exercises, the year was divided into *moieties*. The benchers appointed one Reader and four cupboard-men to do duty for the first half-year, from the beginning of Hilary Term to the end of Easter Term. They appointed another Reader and four cupboard-men to perform the like office from the beginning of Trinity Term to the end of Michaelmas Term.

Barristers of little practice or slender fortune generally declined the cupboard, because the office of cupboard-man led in rotation to the dignity of the Readership, which we shall presently see involved expenses too heavy for an ordinary pocket. Those who thus preferred a safe obscurity to a dangerous elevation, were called the "*ancients*" of the house,

and sat at a table apart from the rest, exempted from all duty, and cut off from all promotion.

During term time, the members were supposed to be engaged for the earlier part of the day in the Courts at Westminster. Academical exercises, therefore, were deferred till after dinner and after supper; and *mootings* were maintained, mingled with potations, on the alternate Mondays, Wednesdays, and Fridays.

The mootings of the first half-year commenced with Hilary Term, and were constantly superintended by the great functionary, the Reader, and three of the Benchers. The principal performers were the four cupboard-men. Barristers and students took their share in the discussion, or were content to listen.

The subject of the mootings were feigned cases thrown into the form of pleadings, which were generally opened by a student, and followed up by an utter barrister. The debate was then taken in hand by the cupboard-men, with whom, likewise, the Benchers contested. And, finally, the Reader himself, high over all, closed the discussion by delivering his opinion.

The avowed object of these exertations was to promote the faculty of ready speaking. To secure this end, the disputants were kept in ignorance of the topic until called upon to discuss it. The case, drawn up by the Reader, was laid upon the salt-cellar before meals; and none were to look into it upon pain of expulsion from the Society.

At the close of Hilary Term, the Reader was to prepare for the delivery of his Lent lectures, or, what were technically called, his vacation readings. He was also to provide the means for the festive entertainments which accompanied them. And this last was the most serious part of the business; the expense proving not unfrequently the ruin of the hapless Reader. He held, indeed, a very costly appointment; for he was obliged or expected to maintain great state in the Inn. While delivering his lectures, he kept open house in the Hall;

and, out of his private purse, defrayed all the charges. Dugdale tells us that in ten days one Reader spent 600*l.* in feasting his visitors—an enormous sum, if we consider the change since produced in the value of money.

But it will be asked, what induced the Reader to sustain this formidable expenditure? The answer is, the office, in the first place, was the only channel to the Society's Bench. This however was but a small part of the advantages expected from it. The Reader had not only the first rank in the Inn, but had precedence in Court the moment his appointment was notified to the judges.\* He had the remarkable privilege of calling to the Bar; he had the first claim to be made a judge; and from his class were chosen the King's Attorney-General and Solicitor-General, as well as the King's Serjeant; to say nothing of the inferior, though lucrative, offices of Attorney-General to the Court of Wards and Liveries, and Attorney-General to the Duchy. These were the temptations which made him recoil from the ancient's table, which reconciled him to the labours of the cupboard, and, finally, which seduced him, even at the hazard of insolvency, to accept the dazzling but perilous honours of the Readership.

The Lent readings generally lasted about a month. The Reader, before commencing operations, withdrew from the public eye for some time, in order to enhance the effect of his re-appearance. On a given *Sunday* he disclosed himself in the Temple Church, attended by a retinue of friends and admirers, a sub-reader bearing his train, an utter barrister carrying his bag, and sixteen servants in livery swelling the procession. On the following Monday, in the morning, he repaired to the Hall, where the Society were assembled to receive him; and they all had breakfast together, the Reader presiding. The proper business of the day began by his taking the oaths of supremacy and allegiance, after which he

\* In consequence of jobbing, the Reader was deprived of this privilege; the judges having ordered, *6* Carl. I, that "none should be admitted to the Bar but by the Bench, when they find a number of fit and learned students well deserving the same."

announced by the mouth of his sub-reader the Statute selected for commentary. This done, he delivered his prælection.

But here again it would appear that the Reader was not only to lecture and expound, but to conduct disputations; for no sooner had he finished his reading than the cupboard-men fell to work, impeaching his conclusions, right and left, the judges and serjeants joining in the fray; until at last the Reader himself rose, vindicated his own opinions, and for the time put an end to the discussion. At this stage dinner was served. That meal over, the debate was revived by one of the indomitable cupboard-men, who forthwith challenged the Reader to discuss with him his cases. Other combatants followed; and again, as before, the Reader interposed to finish the debate, which he invariably did by giving judgment in his own favour, and demolishing his antagonists. The repast of supper was then announced, "and so," says Dugdale, "*that day's exercise was terminated.*"

In the ensuing Easter Term the same Reader again predominated at mootings in like manner as he had previously done in Hilary; and as the reward of his services (supposing nothing more advantageous to have been offered to him) he was called to the Society's Bench. In taking his place he, as usual on such occasions, professed a profound sense of his own unworthiness, uttered many expressions of obligation to the cupboard-men and barristers for their valuable assistance in the exercises, and bestowed large commendation on the students for their orderly behaviour throughout the ceremonial.

In Trinity Term the second Reader succeeded, and pursued a career precisely correspondent with that of his predecessor. He took the highest rank in the Inn and in the Courts. He maintained costly, perhaps ruinous, hospitality. He feasted nobles, prelates, ministers of state, judges, Queen's Counsel, serjeants, royal favourites, court parasites, and civic functionaries—in short, all who by their good word might advance his



interest or exalt his reputation. Like his predecessor, he argued and debated in Term time; he lectured and expounded in vacation. He curbed the undue vivacity of cupboard-men. He snubbed the pert utter. He protected and encouraged the timid student. Until, at length, in the ensuing Michaelmas Term, having run his appointed course as Reader, and having received no other promotion, he, in the fulness of time, subsided into the comparative repose of the Society's Bench.

In this way it must frequently have happened, that two Readers were each year advanced to the government of the Inn; a number probably not more than was necessary to keep up the corporation.

The decay and subsequent extinction of the academic discipline which we have endeavoured, however imperfectly, to describe, is mainly referable to three distinct causes.

In the first place, the subject taught was the Common Law, and that alone. The Legal University professed to teach but a single science, or rather, a branch of science; for it did not teach, or affect to teach, the Roman law or the Canon law; and still less did it pretend to teach the principles of Equity, the law of nations, or the great doctrines of general and comparative jurisprudence. And here was an error into which the judges fell, who had the power, and to whom belonged the duty, to direct an expanded scheme of education instead of the stinted one pursued. This is a very grave consideration; for we believe the defects now imputed to the English law are of a kind which might have been in a great measure averted by paying some attention to the juridical systems of former ages, and the codes of other countries.

The second cause of the decline of discipline was the mode of teaching, which certainly was ill contrived. And yet the reverend Judges suggested no change; but, by a succession of orders, inculcated disputations, as things "whereon the safety of the commonwealth depended."

The lectures or readings were but so many disquisitions



upon Statutes; many of them barbarous. Their general merit may be guessed from the fact, that (with the exception of Lord Bacon's readings on the Statute of Uses) they are now as forgotten as the absurd and costly pageants which accompanied their delivery. The mootings, too, were less fitted for a college than for a debating club, where all are on a footing of equality, and where petulance may be indulged without danger to authority.

There were no tutors, no professors, in the Legal University; and the teachers—if teachers they could be called—were all men seeking their own advancement, more anxious to shine than to instruct.

The third cause, operating in the same retrograde direction, arose from the pompous revels and bombastic ceremonies to which too much of Dugdale is devoted. These idle recreations, originating in monkish observances, must have offended the Puritans—"the bigots of the iron time"—and no doubt brought ridicule and odium on the societies. Yet the respectable Dugdale seems to have thought them an essential and really useful part of discipline.

The extinction of the Reader's authority, with the cessation of mootings and boltings, generated gradually a laxity of discipline, ultimately resulting in a state of things which hereafter will be scarcely credible, though only very recently, and as yet but imperfectly, put an end to. In short, the status of a barrister came at last to be attainable by dinners without any ascertainment of the diner's mental qualifications.

Now, however, under an improved, though still faulty, system we have two kinds of barristers—those who have submitted to examinations, and those who have attended lectures, perhaps without listening to them, or bestowing a thought on the law.

Not satisfied with the existing state of things in the Inns of Court, a new body—the Legal Education Association—propose to establish a University "for the Education of Students intended for the profession of the Law—placing the

admission to both branches of the profession on the basis of a combined test of collegiate education and examination by a public Board of Examiners." How there can be a *combined* test of qualification for two things in themselves very different from each other does not clearly appear. The proposed University will be confined to *professional* tuition—and limited to those who are intended for professional practice.\*

Whether such a restriction is wise, or even consistent with the name of a University, is a question for discussion. But there can be no doubt of its inconsistency with the original institution and objects, both of the Inns of Court and of the Inns of Chancery, which were declared by the judges in the 12 Jac. I. to have been "instituted chiefly, indeed, for the profession of the Law; but in a second degree, also, for the sons of the nobility and gentry," who, in the words of Fortescue, "did not desire to be thoroughly learned in the Law, nor to get their living by its practice." The exposition of Fortescue is an argument for the wisdom of our ancestors. It shows the object of having two kinds of barristers—those who looked on jurisprudence as a science, and those who desired to make the legal profession a source of emolument and a means of subsistence.

In an address delivered by Lord Brougham† twenty years ago, he stated that "in the reign of Elizabeth above 2000 students frequented the Inns of Court;" equal, his Lordship said, "to 10,000 in the present day, and by far the greater number were the sons of gentlemen who used to learn the laws without any view to practice."

That there should have been "above 2000 students" in the Inns of Court, at a period when the English population was short of three millions, is a startling fact if it be a fact. But we must doubt the accuracy of the enumeration. The Inns

\* Sir Roundell Palmer in his able Speech at Lincoln's Inn, declared that no such restriction was contemplated.

† As President of the Law Amendment Society.

of Court devoted to Benchers, Readers, and Barristers, could not have accommodated so many as 2000 students, or even a third, or fourth, of that number.

The great change, overlooked by Lord Brougham, has been that now *all* the students, keeping terms, are in the Inns of Court (not less in the present year than 1409); whereas, formerly, the students were chiefly, if not wholly, in the Inns of Chancery. Thus Fortescue, *temp.* Hen. VI., states that “there belong to the law, ten Inns of Chancery, and sometimes more; in each of which there are a hundred students at the least, and in some of them a far greater number—though not constantly residing.” \* The ten Inns of Chancery referred to by Fortescue are, we presume, those which still exist under the titles of Furnival’s, Barnard’s, Thavies’, New Inn, Clifford’s, Symmond’s, Staple, Clement’s, Lyon’s, and Strand Inn. These establishments are turned, doubtless, to profitable purposes; but they retain little of their original character, and are, we learn, utterly destitute of students. There must have been negligence somewhere. The “Legal Education Association” ought to inquire into this, and not waste time in criticising too eagerly the Inns of Court; which (though susceptible of improvements about to be adopted) have on the whole kept steadily, for five centuries, to the objects of their original institution; and are now more prosperous, more popular, and more useful, than they ever were before.

The Inns of Chancery “belong to the Law;” and have property of great value, which should be restored to its pristine uses. The Benchers of the Inns of Court, and the Judges, as visitors, have here a duty to perform; the execution of which will greatly promote the objects of the “Legal Education Association.”

## ART. VIII.—ON THE RIGHT OF COUNSEL TO RECOVER HIS FEES.

**T**HE recent case of *Mostyn v. Mostyn*,\* has directed the attention of the profession to the nature of the claim of counsel to recover fees against his client, and as the law on this matter is little understood, either by Bench or Bar, we propose to avail ourselves of the present opportunity to consider the whole subject.

As a preliminary to the determination of this question, it is very desirable to ascertain the exact nature of the debt incurred in respect of counsel's fees. If we may use such an expression it seems to possess a kind of amphibious nature. It is certainly higher than that of other obligations which are honorary or moral, inasmuch as, under certain circumstances, it becomes a legal debt and may be recovered as such. We may observe that we are referring to the nature of counsel's fees where there is simply the relation of counsel and client, and where there is not the addition of an actual promise, whether arising from words, writing, or part-payment. In such case it must be conceded that fees cannot be recovered by the counsel by action against his client; but where, in the course of litigation, such fees are paid by the party who wins the verdict or the judgment, in that case he may recover the fees against the losing party as a legal debt.†

It would appear from the statement of the judges in the above case that a debt due to counsel for fees is one of an oscillatory nature as it were. Though moral or honorary standing alone, it is, by a slight addition of circumstances, capable of being converted into a legal obligation. It would appear from that case also that it is a debt which the Courts consider ought to be paid, and, therefore, where, as-

\* Law Rep., 5 Ch. App., 457, 1 c. W.R., 657.

† *Morris v. Hunt*, 1 Ch. Rep., 544.

Law T. Rep., N.S., 461. 18

according to the general law of the land, facts or circumstances would convert an honorary or moral obligation into a legal debt, then *a fortiori* such result ought to take place in the case of a debt due from a client to his counsel. In order to show how practically to apply this reasoning, we would refer to *Poucher v. Norman*.<sup>\*</sup> In this case a certificated conveyancer sued for his fees and recovered. Now it must be granted that in the case of work and labour done by a barrister there is no implied contract for payment in respect of such work and labour, as would be the result in the case of a certificated conveyancer, but still it would appear that the promise which the law implies from the mere circumstance of the work being done in the case of other persons, may be supplied by the distinct act of the client. Therefore an express promise in words or writing, or an implied promise by part-payment, would supply that promise, or rather add a promise which the law, in cases of work and labour done generally, itself supplies.

So much for a definition of the nature of the obligation on the part of a client to pay to counsel his fees. But a more important point arises on the very threshold of this question, namely, whether or to what extent counsel and client may enter into binding contracts, because it is obvious that if they have no power to contract, the ordinary law applicable to obligations cannot be brought to bear in their case. We think that the following proposition may be maintained, namely, "That with reference to matters unconnected with advocacy in litigation, counsel and client may enter into binding contracts in law." It must be borne in mind that according to law, until the contrary is shown, it will be presumed that where parties are *sui juris*, they have power to contract. But there are express authorities in favour of the above proposition, which we will now proceed to state. The first case is that of *Veitch v. Russell*.<sup>†</sup> There a physician sued a lady who had employed him to attend her brother for

<sup>\*</sup> 3 B. & C., 744.

<sup>†</sup> 3 Q. B., 928, s. c. 3 G. & D., 198.



the fees of such attendance. It does not seem necessary for us to go into the details of this case. It may be sufficient to state that letters were relied upon by the physician as constituting a contract, which were held by the Court not to have that effect, and, indeed, they seem on examination more to relate to the reduction or evasion of payment of an honorary demand, rather than to the creation of a new, or to the admission of any legal, liability; but the case is important to the present purpose, because the Court there admitted or decided that both counsel and client, and physician and patient, may enter into contracts in law, only in this particular case there was not sufficient evidence to establish such a contract. In fact the case broke down, not on principle, but from want of evidence.

The case we next refer to is that of *Hobart v. Butler*.\* The head-note to this case is: "A barrister cannot sue for his fees upon an implied contract for their payment, but they are recoverable by an express contract." In this case an attempt was made to make a client, a lady, who had received money out of Court, liable to pay her counsel his fees, which formed part of such money. It appeared that the Dublin town agent of the country solicitor who appeared for the lady, called on the counsel and stated that if he would initial the briefs with a view to taxation, the client, the lady, who was coming to Dublin in a few days, would pay the amount. On this state of facts the lady was sued for the amount by the barrister. The Court did not draw any distinction on the ground that the promise was made by the town agent, but treated him in the same way as if he had been the country solicitor himself. But they held the client not liable on this contract, on the ground that it did not come within the authority of a solicitor to make such a special arrangement with counsel on behalf of his client, and that in fact it was in the nature of a step taken by the solicitor himself, in order to enable him to obtain taxation for his own benefit, and that it

\* 9 Ir. Com. Law Rep., 157.

was a departure from the usual course, instead of paying counsel the fees on his briefs at the time, to ask him to sign for fees which he had never received, and to bind the client to such an unusual or irregular arrangement. Therefore the action failed, but the Court expressed a clear opinion in favour of the right of a barrister to enter into a contract with his client.

With respect to this case of *Hobart v. Butler*, it is important to remark that the distinction is not drawn by the Court between contracts having reference to advocacy in litigation, and those relating to non-litigious business—a distinction to which we shall presently allude. The rule, therefore, is too broadly laid down by the Court in that case, though, with this qualification, the case is good law.

We now refer to the case of *Swinfen v. Lord Chelmsford*.\* C. B. Pollock there says (pp. 917-8):—

“This case is of very great and general importance, raising questions as to the duties and responsibilities of the members of the Bar, and the obligation under which they come by accepting a retainer, and afterwards holding a brief, or (as is more frequently the case) by taking a brief without a retainer. They have no legal claim to any remuneration for the services they render, though they usually receive a fee or honorarium, and they undoubtedly (in the ordinary course of business) enter into no *express contract*.”

Here, again, with reference to this case of *Swinfen v. Lord Chelmsford*, it may be remarked that the principle of law is laid down too broadly, for the distinction is not drawn between litigious and non-litigious business, in fact until the case of *Kennedy v. Broun*, which we shall presently cite, though this distinction, existing in our law from the earliest period, is marked and clear, yet it is to be found nowhere in our books laid down as an actual rule, but it is to be gathered rather by inference than any express statement, but with

\* 1 Hurlst & N., 890.

such qualification the case of *Swinfen v. Lord Chelmsford* lays down the law in the proper way.

With regard, also, to the term "express contract," which is used in both the cases of *Hobart v. Butler* and *Swinfen v. Lord Chelmsford*, some ambiguity is likely to arise unless this point be explained. The real meaning of the Court evidently was, not that counsel and client could enter into an express contract as distinct from an implied contract, but merely this: that though the ordinary relations of counsel and client does not raise any contract in law, express or implied, yet they may depart from the honorary rule and enter into an actual contract, whether expressed or implied. This distinction is adverted to in the case of *Kennedy v. Broun*.\*

We would now cite the case of *Kennedy v. Broun and Wife*.† In this case, as is well-known, Mr. Kennedy, who had received the usual fees on his briefs, proceeded to seek to enforce an agreement on the part of his client, Mrs. Swinfen, to pay him the sum of 20,000*l.*, in respect of services rendered by him as her advocate in the course of litigation for the recovery of an estate.

The case was remarkably well argued by Mr. Kennedy in his own behalf. He appears to have ransacked the reports, ancient and modern, and to have collected anecdotes and passages from books and literature of all kinds and descriptions, and allusions referring to the usage and custom in ancient times in our law, in order to show the relations existing between counsel and client. This case also was very well considered by the Court, where it was decided, namely, the Court of Common Pleas. The judges reserved their judgment, and examined and investigated, evidently with great care and deliberation, all the authorities and dicta brought forward by Mr. Kennedy in the course of his argument, and on the whole, the written judgment delivered by the Court of Common Pleas is, perhaps, one of the most remark-

\* 13 Com. B., N.S., 782-3.      † 13 Com. B., N.S., 677.

able for learning and research, judicial ability, and clearness of exposition, to be found anywhere in the reports. We do not propose to bring before the notice of the reader all the facts of this case, or to state in detail the various arguments adduced on one side or the other, but it will be sufficient for our purpose if we state the result at which the Court arrived after consideration of the authorities. The judgment of the Court is to this effect (pp. 727-8):—

“We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.”

Now, we think, that *Kennedy v. Broun* has clearly established as law two propositions—one, that a contract by counsel and client with reference to advocacy in litigation is illegal; the other, that with reference to matters unconnected with advocacy in litigation, counsel and client are mutually capable of entering into a contract. The Judges of the Common Pleas, evidently from an allusion made at the end of their judgment, contemplated that there might be an appeal from their decision to the Court of Exchequer Chamber, and therefore it seems desirable that we should make a few remarks on the reasoning of the judgment of the Court of Common Pleas in the case of *Kennedy and Broun*, because since the year 1860, when that case was decided, there has been no opportunity for the decision being reviewed by any court whatever, and the case, therefore, might be reversed, or extended by an Appeal Court. The principle we apprehend then on which the Court proceeded in *Kennedy and Broun* is based on an intelligible and sound foundation. The distinction between advocacy in litigation, and the business performed by a counsel in chambers, whether as arbitrator, special pleader, conveyancer, or legal adviser, is very clear and distinct. In



the case of an advocate who exercises public duties and responsibilities of a high and important nature, involving a special skill and a particular position acquired by means of long years of waiting, and a particular kind of confidence which the public place in his abilities, it would be difficult to measure the value attached to such services by any kind of pecuniary reward; it would, therefore, be extremely undesirable, and contrary to public policy, that an advocate who had acquired a high position should be able, or allowed, to enter into a contract with his client to obtain an extravagant or unusual reward, or to limit or confine his services to any individual client.

But the case is different with reference to non-litigious business. In those cases the rates of remuneration are either fixed or do not vary considerably whether the work be done as arbitrator or chamber counsel. It would be productive of great inconvenience to the individual counsel, and mischief to the public, if in the case of business done at chambers, the client were forbidden, under special circumstances, to convert his moral into a legal obligation. It would be difficult to secure the services of a competent arbitrator, who has often to devote weeks to the investigation of a complicated case, where his labours are performed in secret, and where, unlike the advocate who may secure public attention by a case though he does not receive any fee, his services would go entirely without remuneration if he could not obtain a legal right to it. Again, the same principle applies to a chamber counsel, who has often to devote weeks, or months, or even years, to the service of a single client. In such cases as these the client is likely to be better served, and no rule of public policy is contravened, by allowing a power to contract to exist; but, on the contrary, mischievous consequences would ensue if the incapacity to contract should be extended to counsel and client, as distinguished from advocate and client. Under such circumstances, therefore, we think that the alternative proposition, which is



certainly not a dictum, but an express decision in *Kennedy v. Broun* to the effect that, as regards matters unconnected with advocacy in litigation, counsel and client may, enter into binding contracts, rests on a sound and satisfactory basis and ought to be acted upon by the courts. However, it is unnecessary to rely exclusively either on the authorities above cited previously to *Kennedy v. Broun*, or on that case itself, in support of this proposition. We think that it is part of the law of England that, as regards non-litigious business, counsel and client may enter into binding contracts. It is very remarkable that in the cases which we shall subsequently cite, no doubt whatever is raised as to the capacity of counsel and client to enter into a contract under the particular circumstances under consideration, but only whether or not there was an actual contract; that is, the counsel and client were tacitly admitted by court and counsel to be parties capable of entering into contracts, like any other men who had done and for whom was done work and labour, only it being of course conceded that the work and labour of counsel itself implied no contract, as it does in other cases, the question simply was whether or not there was an actual contract. We cannot, indeed, find any trace of a doubt on this point raised in any of the cases.

We now proceed to consider the nature of the moral obligation on the part of the client to pay his counsel. The proposition may be stated as follows: "That a moral obligation moved by a previous request is a sufficient consideration in law to support a promise to pay, and that where the two unite there the debt is legal." The rule as to moral obligations moved by a previous request is laid down in the leading case of *Lampleigh v. Brathwaite*.\* The material decision in that case is "that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit, or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it

\* Hobart 105, 1 Sm. L. C., 139.

is not naked, but couples itself with the suit before, and the merits of the party procured by that suit."

Though *Lampleigh v. Brathwait* is the leading case with reference to this class of moral obligations, yet we find the above rule of law in full force and vitality in the reign of Queen Elizabeth, and indeed it may be said to form part of the Common Law of England, for we think it would be difficult to discover the period when the rule was first established. It is founded on the soundest good sense, namely, that where one man does a service or confers a benefit on another at his request, such service or benefit shall be considered to form a good consideration for a subsequent promise to pay a sum by way of remuneration for such benefit or service so done or conferred. It is particularly important, however, that we should direct attention to the class of moral obligations which are not moved by a previous request, and which do not in law form a sufficient consideration to support a subsequent promise. There is virtue in the previous request, and, to make this distinction more intelligible, we would remark that it is not merely technical, but founded in good reason, for assuming that a moral obligation or a mere voluntary courtesy could be made the consideration to support a promise to pay, manifest mischief and inconvenience would ensue from such a doctrine, for the generous or weak-minded might be made to pay extravagant sums for supposed benefits or obligations conferred behind their backs, and without their previous knowledge or consent. Therefore the law steps in and says, on grounds of public policy, that in no case, however sacred may be the obligation, however urgent the benefit, however important the favour, shall a moral obligation which is a mere courtesy, that is, not done at the request of the party sought to be charged, form any foundation of debt whatever, or be held to support a subsequent promise to pay. But, again, where the moral obligation is moved by the previous request of the party, there the law will not measure the amount of remuneration which the party benefited afterwards promises to pay

in respect of the service so done, because it being done at his previous request it must be reasonably supposed that he would be able himself to measure the amount of money which he thinks the party who has done such service deserving to receive. Therefore the general rule is one of benefit, and as regards those exceptional cases where the party sought to be charged may in a moment of generosity have promised to pay an extravagant reward for a service done at his own request and previous knowledge, it is fair and reasonable that he himself alone, and not the law, shall be considered to blame for such want of caution.

We should not, however, consider it necessary in any way to advert to the distinction between moral obligations, pure and simple, and moral obligations moved by a previous request, were it not for the fact that at an early period in our law there arose grounds for maintaining the doctrine that a moral obligation, not moved by a previous request, was a sufficient consideration to support a promise to pay, and that Common Law judges of the first eminence have sometimes laid down the rule in such general terms as to exclude the case of moral obligations moved by a previous request; therefore it seems particularly necessary to draw attention to this distinction, though we do not propose to cite the cases relating to moral obligations pure and simple, because to do so would take us away into a track which does not concern the present question. A general reference, therefore, to the doubts which have arisen with reference to moral obligations pure and simple may suffice. It appears that the supposed doctrine, that a moral obligation simply would be sufficient consideration to support a promise to pay, arose from some dicta in cases which occurred before Lord Mansfield and Mr. Justice Buller. Anything which fell from judges of such eminence was justly considered of importance, and hence there seems to have arisen a floating idea in the minds of judges and counsel that a moral obligation, or a mere voluntary courtesy, would support a promise to pay.

dicta, and the cases referring to them, are collected in a note to the case of *Wennall v. Adney*.\* The learned editors in this note collect together the authorities on the subject, and arrive at the conclusion, that a moral obligation not moved by a previous request, which will be sufficient consideration to support a promise to pay, must be an obligation which was once a legal obligation, or which might have been such had it not been for the Statute of Limitations, or the Statute of Frauds, or through some formality not having been complied with. This, however, is a class of moral obligations which does not concern the present question, though for the reasons stated it is necessary to advert to them. It is important also to remark that in the text books on the law of contracts the passage from the note to *Wennall v. Adney* is extracted, and in terms it would seem to exclude the case of moral obligations moved by a previous request, but when examined it will be found to bear the construction which we give to it.

The rule laid down in *Lampleigh v. Brathwait* is stated to be binding law at the present day in two modern cases, namely, in *Kaye v. Dutton*† and *Eastwood v. Kenyon*.‡ The Court of Exchequer in Ireland also, in the case of *Bradford v. Roulston*,§ reviewed all the English authorities on the subject, and arrived at the conclusion that the rules as laid down in *Lampleigh v. Brathwait* is of universal application.

We may remark that in *Kennedy v. Broun* it was tacitly decided by the Court to be clear that the moral obligation on the part of a client to pay the fees to his counsel, was a moral obligation moved by a previous request within the law as laid down in *Lampleigh v. Brathwait*. We do not indeed find in the law any distinction between one moral obligation moved by a previous request and another obligation of such a nature; they all form one class, each alike a

\* 3 Bos. & P., 249.

† 7 Man. & Gr., 807.

‡ 11 Ad. & Ell., 488.

§ 8 Ir. Cas. L. Rep., 468. Ex., 1858.

sufficient consideration in law to support a promise to pay, but if there be a distinction between one such moral obligation and another, the difference is certainly in favour of the counsel, because he rarely acts for his client without formal directions of an elaborate nature. The request, therefore, is not as in many other cases made in words but in writing, and as to writing indeed, not in that of a letter, but in formal and express, and carefully prepared, instructions. There could not, therefore, be a stronger case of moral obligation moved by a previous request than the moral obligation on the part of the client to his counsel.

We now proceed to state the cases which have occurred with reference to counsel and client from the earliest period to the present time. They all proceed on the basis of the rule we have mentioned, though it is not always so expressed in words, but we think it is manifest that the moral obligation on the part of the client to pay his counsel was treated as a good consideration, so that where followed by a promise, the two united and made the debt legal, although the mere relation of counsel and client standing alone would not be sufficient to constitute a debt.

In Rolle's Abridgment (p. 435, pl. 10) it is stated as follows :—

“ If the grantee of an annuity *pro consilio impenso et impendendo* refuse afterwards to give counsel, this does not determine the annuity, because it was granted as well for the services past as for those to come.”

In *Mingay v. Hammond*,\* there is this case :—

“ Annuity *pro consilio impendendo* brought by Mingay, a Bencher of the Inner Temple, against Hammond, and demands 6*l.*, being the arrears for three years. The defendant pleaded in bar that he had divers injuries offered him, &c., for which he intended to exhibit a Bill in the Star Chamber, and that a Bill was drawn accordingly, which he brought to Mingay, and entreated

\* Cro. Jac. 482.



him to put his hand to, and he refused, whereupon he ceased his annuity, supposing that by this denial the annuity was determined. Upon this plea the plaintiff demurs. The whole court was of opinion, without argument, that it was an ill plea, because a counsellor (who hath such a fee) is not bound to put his hand to every bill, but only to give counsel, and a day was given to show cause why judgment should not be given for the plaintiff."

Again, in Plowden's Com. (p. 32) there is this statement:—

"As if one grants to another an annuity *pro consilio impendendo*, the grantee shall have a writ of annuity without showing that he has given him counsel, for the showing thereof is not for his benefit, and the denial of counsel goes in defeasance of the annuity which ought to be shown by the defendant, because he shall have benefit from the defeasance."

Also (*Ibid.*, p. 160):—

"As if an annuity is granted *pro consilio impendendo* and the grantee has divers faculties, yet the counsel shall be given in such faculty as was intended."

The next case we cite is Marsh and Rainsford's case:—\*

"If one cometh to a serjeant-at-law to have his counsel, and the serjeant doth advise him, and afterwards the client, in consideration of such counsel, promiseth to pay him 20*l.*, an action lieth for it, and so Popham said it had been adjudged in the Exchequer."

We find this case referred to in Comyn's Dig.,† as follows:—  
"Action upon the case upon assumpsit, and that he had given counsel," referring to 2 Leon., 111. The case is also referred to as an authority in Viner's Abridg.‡ It is also cited with approval in the cases of *Hobart v. Butler*, and *Kennedy v. Broun* (*ubi supra*).

The next case is *Marsh against Kavenford*.§

"And they" (Popham, Daniel, and Coke) "said it was adjudged

\* 2 Leon., 111.

† Vol. I., p. 283, pl. 29.

‡ Vol. I., p. 300.

§ Cro. El., 59, case 1.

in the Exchequer that a promise of 10*l.* in consideration of counsel given; this was good, though the counsel was given before."

We now refer to modern cases on this subject. The first is that of *Egan v. The Guardians of the Kensington Union*,\* tried before Lord Denman, C.B., at the sittings in Middlesex after Hilary Term, 1841. The action was for work and labour done by the plaintiff as a returning officer on an election of guardians of the union. An express contract was proved for remuneration at so much per day, and the plaintiff recovered. We do not, however, attach so much importance to this case as the judges who refer to it, because the business done was unconnected with professional matters.

The next are cases relating to arbitrators who, we think, are placed exactly in the same position as chamber counsel, that is, they cannot recover their fees against their clients on the mere relation alone, but where to such relation is added a promise, there they can maintain an action for remuneration. For instance, in the first case we cite the arbitrator, having no promise on which to rely, could not recover his fees. It is that of *Virany, Executor, v. Warne*.†

We may observe that it does not appear from the report of this case whether or not the arbitrator was a barrister, but no doubt the same rule would apply whether the arbitrator be a barrister or not, that is, in any case, the office is simply honorary and, unaccompanied by a subsequent promise, confers no right to remuneration.

The next case to which we refer is the old one of *Hardres v. Prowd*.‡ This case is as follows:—

"Hardres brought an action upon the case against Prowd, and declared that whereas he, at the instance and request of the defendant, had taken pains to reconcile differences betwixt the defendant and J. S., and others, the defendant did assume and promise unto the plaintiff to pay unto him 100*l.* Glyn, C.J.—It is as you say, for here is more than a voluntary courtesy upon which no consideration for

\* 3 Q. B., 985, n.

† 4 Esp. N.P.C., 47.

‡ Styles' Rep., 465.

a promise can be grounded, for the pains here were undertaken at the instance of the defendant."

It does not appear from the report of this case either, whether the arbitrator was a barrister, but whether or not we think is immaterial. The case is cited with approval by the Courts as an authority to show that the office of arbitrator is simply honorary, and does not confer any right to remuneration, except where, as in this case, followed by a promise.

Then there is the case of *Hoggins, Leary, and Bagshaw v. Gordon, and others*.\* This was an action of assumpsit for work and labour by two arbitrators and an umpire, who were barristers, against the defendants, who had been awarded to pay the costs of the reference. The statement of the promise in the declaration is as follows:—†

"And thereupon defendants, afterwards to wit, &c., in consideration that plaintiffs, at the request of defendants, would take upon themselves the burden of the reference, undertook and promised to pay them their fair and reasonable costs of the said award, in such manner and at such time as plaintiffs, as such arbitrators, should by their said award in writing direct and appoint."

It would appear from the report of this case, though not so stated in words, that the arbitrators were appointed by attorney, and that the promise to remunerate them was also made by the attorney, though the declaration declares both the retainer and the promise to have been made by the defendants, because the agency is so little material at law, on the ground that principal and agent are the same. It appears that a cause came on for trial in which the defendants in this case were plaintiffs, and such cause was referred in Court to arbitration; it is manifest, therefore, from the circumstances under which the reference to arbitration was made, and from the plurality of the plaintiffs, that the transaction must have taken place by attorney, and not by the defendants acting

\* 3 Q.B., 466, s.c. 2 G. & D., 656. 6 Jur., 895. 11 L.J. Rep., N.S., 286.

† See 3 Q.B., pp. 467-8.

personally. To this declaration there was put in a special demurrer, raising every possible ground of objection to the declaration which could suggest itself to the ingenuity of the pleader, in fact, it is quite a marvel of special pleading. The principal ground of demurrer is as follows :—\*

“ That as arbitrators are not legally entitled to remuneration as such, unless under an express agreement to remunerate them, such express agreement, if it existed, should have been set forth clearly and with certainty, so that the Court could judge of its legal sufficiency, and the defendants know precisely the nature of the demand against them ; whereas the contract alleged is so ambiguously and insensibly set forth, that it is impossible to determine what is its precise legal nature, or what answer can with safety be made to the alleged demand upon it.”

Lord Denman, C.J., in delivering the judgment of the Court, says :—

“ This was an action for work and labour by two arbitrators and an umpire against the defendants, whom their award required to pay the costs of the reference ; these costs being left in their discretion. Numerous objections were taken on special demurrer. One of them was, that such action will not lie, as the remuneration of an arbitrator, like that of a physician or barrister, is left to the option of his employers, and cannot be enforced. But it was properly admitted in the argument that where there is an express promise to pay, such an action may be maintained.”

This case is referred to with approval in *Kennedy v. Broun*, and we cannot find that the authority of the decision has been questioned since it was decided. As, however, it would be open to an Appeal Court to re-consider the ground on which this decision rests, and even to reverse it, we would wish to direct attention to the solemn nature of the above decision. In the first place, the plaintiffs were three barristers who must be necessarily supposed to be well acquainted with a subject, so nearly connected with the duties of their profession, and the

\* See 2 G. & D., n. 659.

liabilities incurred in respect of such duties. Mr. Hoggins, the principal arbitrator, had been at the Bar twelve years, having been called in 1830, and is now a Queen's Counsel, and one of the leaders of the Northern Circuit. In the *Law List* of 1842 there is "special pleader" appended to this gentleman's name. Mr. Leary, intended apparently from the same *Law List* for Leahy of the Western Circuit, had been called in 1831, and Mr. Bagshaw, the third arbitrator or umpire appointed by the other two, seems to have been H. R. Bagshawe, of 2, New Square, Equity draughtsman and conveyancer, who had been called in 1825. With regard to the counsel who argued the case, they were selected by a rare exercise of judgment. Mr. Bovill (called in 1841), who was the counsel for the defendants in support of the demurrer, is now Lord Chief Justice Bovill, of the Common Pleas. Mr. Peacock (called in 1836), who argued the case for the plaintiffs has just retired from the Chief Justiceship of Calcutta. The judges who constituted the Court were Lord Denman, Patteson, Williams, and Coleridge, all judges of exceptional eminence and experience. The Court reserved their judgment, and when that judgment was given it was unanimous. We think that it would be difficult to suppose a case where a decision of a court could be better argued, or more solemnly decided; and, therefore, such a case should be considered as part of the law of the land, which it is now too late to question.

It would appear that the position of a barrister acting as arbitrator is precisely the same as that of a barrister acting as chamber counsel, namely, his fees or costs are liable to be referred to taxation in the same way, and in some cases they become a legal liability, though alone they are simply honorary. Therefore they have been alike submitted to taxation, in olden times by the Prothonotary,\* and now by the taxing master.†

\* *Grove v. Cox*, 1 Taunt., 165. *Miller v. Robe and another*, 3 ib., 461. *Fitzgerald v. Graves*, 5 ib., 342. *Swinford v. Burn, Gow*, 5, see p. 7.

† *Sinclair v. G. E. Ry. Co.*, 21 L.T., N.S., 752, Q.P.



"Russell on Arbitrators" (p. 457) treats the case of an arbitrator to be the same as that of a barrister, and states (p. 458):—

"As the retention of the award is practically the only security on which he can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award to the party demanding it until he has paid the arbitrator's charges."

This is exactly the course pursued by many barristers who decline to deliver up their briefs until they are paid their fees. Again, in "Chitty on Contracts" (p. 516), there is this statement:—

"If, however, the arbitrator be a barrister, and he be employed in his professional character, he cannot recover any remuneration for his services unless there be an actual contract to that effect, because in such case the claim would fall within the principle that the employment of counsel is honorary, and that there is no implied contract for a pecuniary reward."

The learned writer, therefore, here treats the case of a barrister acting as arbitrator, and a barrister acting as counsel as being precisely in the same category.

A very important branch of our subject still remains for consideration, namely, whether the present custom or etiquette by which counsel is only retained through the intervention of an attorney or solicitor, has in any degree affected the liability of the client. We think the following proposition may be established:—That an attorney is the agent of his client, therefore all acts done and payments made by the attorney are not binding on him, but only on his client the principal.

In the first place it is important to bear in mind the law between principal and agent generally, because that controls the special agency between attorney and client. Mr. Justice Story, in his work on Agency (pp. 511-12), thus defines the law on this head:—

"In the first place, then, as to the rights of third persons against principals growing out of the contracts of their agents. It may be generally stated that wherever an agent, having proper authority, makes a contract for or on behalf of his principal, that contract becomes obligatory on the principal, and the other contracting party has ordinarily the same rights and the same remedies against the principal as if he had personally made the contract. The whole doctrine rests upon the maxim already referred to, *Qui facit per alium facit per se*, and it is a plain and obvious dictate of natural justice that he who is to receive the benefit shall bear the burden."

The law is laid down in similar terms in "*Paley on Principal and Agent*," \* and in "*Leake on Contracts*," † and "*Broom's Legal Maxims*," ‡ and 1 Sm. L.C., 147, and authorities there cited. The practical application of this law of agency is exemplified in the cases of *Hamilton v. Clanricarde*, § *Whitehead v. Tuckett*, || *The Duke of Beaufort v. Neeld*, ¶ and has been recognised by the Legislature in the Mercantile Law Amendment Act.\*\* Indeed at law the principal and his agent are considered as one and the same person, *Caldwell v. Ball*. ††

Having thus stated the law relating to agency as it affects principals and agents generally, we now proceed to show that this law is applicable to the special agency between attorney and client. Pulling, in his work "*On the Law of Attorneys*" (p. 85), says:—

"The appointment of an attorney in matters other than actions, suits, or proceedings regulated by express legal provision, is governed by the general law applicable to the appointment of ordinary agents."

And in 2 Petersdorff's Abridgment (p. 40), it is stated that:—

"The general principle which applies to other cases of agency is

\* Pp. 178, 189, 243, 251, 255, 308-9, and Note, and 388. † P. 265.

‡ Pp. 784-5. § 1 Bro. P.C., 341.

|| 15 East, 400. ¶ 12 Ol. & F., 248.

\*\* 19 & 20 Vict. c. 97, s. 13. †† 1 T.R., 205.

applicable to the contracts of an attorney acting as such, namely, that where a party is professedly acting for another, the principal is bound and not the agent, for an attorney is the agent of his client and is acting for him."

Again Pulling (at p. 102) remarks:—

"The authority of attorneys and solicitors, duly retained and appointed, is very extensive—including not only that which is expressly given by the letter of the warrant, but that which is legally implied. It extends, in fact, to everything that is necessary for the accomplishment of the work for which they are retained or employed."

And the learned writer cites authorities in support of that statement. In *Hobart v. Butler* \* the Court thus states the law as follows:—

"The solicitor has, by his employment as such, authority to bind his client by acts done by him within the scope of that employment. What is or is not within the scope of his employment is to be determined by the nature of the employment itself, and by the known general usage by which it is governed. It results from the very nature of the employment, and it is a part of the established usage which applies to it, that the solicitor shall engage the services of counsel for the client when counsel's services are required."

The same rule of law was acted upon in the cases of *Gainsford v. Grammar*,† *Taylor v. Williams*,‡ and *Martyn v. Kingsly*.§

We now come to a class of authorities which are of importance in the present instance by way of analogy. They relate to those cases where, under the old law of bankruptcy, in the event of the insolvency of the solicitor, the messenger was accustomed to sue the petitioning creditor or client for his fees. It would appear that the messenger under this old system made out, very much like counsel would do, a regular

\* 9 Ir. Com. L. Rep., 157, at pp. 165-6.

† 2 Camp., 9 (see pp. 10 & 11). ‡ 2 B. & Ad., 845, at p. 856.

§ Prec. in Ch., 209.

bill of fees incurred in respect of different bankruptcies, and rendered such bill, as a matter of course, to the solicitor who employed him, and who was, in fact, the only person with whom he had any dealing. Indeed, the relation between the messenger in bankruptcy and the petitioning creditor or client was very much less and more formal in its character than that which ever exists between counsel and client. Probably the messenger was acquainted, through an inspection of the documents, with the name of the petitioning creditor, but beyond that, as a general rule, he knew nothing about him, never trusted him or looked to him for payment. He considered him as a stranger, and in all respects throughout the proceedings transacted business with the solicitor as principal. Yet, nevertheless, it was held that this course of dealing did not in any degree affect the legal relation of the parties. The petitioning creditor, though possessing to the messenger in bankruptcy a mere shadowy existence, if, indeed, he were ever thought of at all, still remained the principal, and as such liable at law, and the solicitor, though actually and ostensibly dealing with the messenger as a principal, and transacting business with him personally, was still at law merely the agent, and did not contract any legal liability whatever in respect of the fees so incurred.\* It has also been held that an attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence for his expenses of attendance.†

We may here state an old case where, according to the report, the servant or agent of the client was sued by the attorney who then occupied the same position as counsel does now. The case has some appearance of authority given to it in consequence of being still referred to in "*Paley on Principal and Agent*," without, however, it would appear, sufficient examination into the authority of the decision. The case we

\* See the cases of *Hartop v. Jukes*, 2 M. & S., 438, and *Hart v. White Holt*, N.P.C., 876.

† *Robins v. Bridge*, 3 M. & W., 114.

refer to is *Haines v. Finch*.<sup>\*</sup> The following is the statement by the reporter of a decision :—

“ And Roll said that in Trevilian’s case, where a servant retained an attorney for his master, and promised he should have his fees, an action of debt was brought thereupon by the attorney against the servant in C. B., and the plaintiff recovered, but upon error in this Court, a rule was given for the reversal of the judgment, notwithstanding the like precedent shown in Bradford’s case, but he said that the judgment was not reversed upon the roll, and his opinion was that the judgment was good.”

It would appear, however, from Rolle’s Abridgment (p. 594, pl. 14) that this is an incorrect report of what actually took place. The following is the substance of the Norman-French of Rolle’s Abridgment :—

“ Also if J. S., a stranger, for anything which appears on the record, comes to an attorney of the Bench and retains him to prosecute a suit in replevin by J. N., the plaintiff, against W. S., the defendant, then depending in *Banc Capiendo de J. S. pro feodo et expensis, &c., ut* in Bradford’s case before, in such case an action of debt lies by the attorney against J. S., by reason that he makes the contract in his own right, and it shall be intended that he shall have the benefit of it, and there shall be no right of action of the attorney against him on behalf of whom he was retained. *Contra Tr. 6 Car. B.R. enter Trivillean and Sands en brieve derror resolve per curiam contra l’opinion de Jones*, that debt does not lie, but that he is sent to his action on the case, and they gave a peremptory rule for the reversal of the judgment, but there was afterwards a stay upon information that the parties were agreeing to an arrangement. Which is entered Mich. 4 (qy. 6) Car. Roll, 96. I myself was counsel for Trevilian, the attorney.”

It would therefore seem that the old decision of Bradford was over-ruled by Trevilian’s case, and the latter is not correctly reported by Aleyn. It is not improbable that as Rolle was the counsel for Trevilian the attorney, in the course of argu-

<sup>\*</sup> Aleyn’s Rep., 6 Mich., 22, Car. 1, B.R.



ment he stated what was his own view of the matter as counsel, and not the decision of the Court, and that thus the mistake in the report of Aleyn arose.

We find also that Aleyn does not appear to have been considered a very correct reporter. The title to his collection is, "Select Cases reported by John Aleyn, late of Grey's Inn, Esq." On such title page, in the copy in Lincoln's-Inn Library, there is written in manuscript—"Adjudged before he ever saw Gray's Inn, so said in the last leaf of 'Degge's Parsons' Counsellor.'" It would therefore seem that these reports were, if we may use the expression, in the nature of posthumous reports, and probably consisted of extracts from the note-books of friends, and not decisions which the reporter himself heard determined.

An exception to this rule of agency is the case where an action may be maintained by one attorney against another for work done (*Scrace v. Whittington*, 2 B. & C., 11). Of the same exceptional nature is the employment of a law stationer, and the case of fees or stamps which the attorney pays in the offices of the different courts. These are considered to be ready-money transactions, and to be necessary for the purpose of taking a step in the cause, or to be made by the attorney himself for the purpose of proceeding in the business, for which he makes a charge to the client, and therefore the client is not personally liable to the law stationer, or in respect of such fees or stamps to the officers whose duty it is to collect them.

We now refer to a case which has been cited by Blackstone in his Commentaries,\* and therefore to which some authority has been given. It is the old case of *Moor v. Row*.† The report of this case is very brief, and is as follows:—

"The plaintiff being a counsellor-at-law brought his Bill for fees due to him from the defendant, being a solicitor, and was to account with him at the end of every term. The defendant demurs.

\* 3 Vol. 28, Original Ed.

† 1 Rep. in Ch., 38. 5 Car., 1 fo., 168.

This Court allowed demurrer *nisi causa*. Demurrer affirmed and the bill dismissed."

It seems from Mr. Kennedy's argument, in *Kennedy v. Broun*, that:—

"In the original roll it appears that the bill stated that the plaintiff was retained by four clients to conduct proceedings in divers courts. He was afterwards introduced to the defendant and an arrangement was made with him that he should pay to the plaintiff at the end of each term such sums as he received for him from the clients. The bill was to obtain an account of these sums. The demurrer is on several grounds. 1st. That the clients were not made parties. 2nd. That the bill did not set forth the proceedings in which the plaintiff had been engaged. 3rd. That there was no precedent for such a bill."

It would therefore seem that the principal ground of objection to the bill by the barrister in that case was, that the solicitor, the agent, was sued, and not the clients who were the principals, and therefore according to the well-known rule of law, such a bill would be demurrable on the face of it, because the agent would not in any event be liable.

We next refer to a case which decides that the present custom of the profession, by which barristers refuse to render their services to clients, except through the intervention of a solicitor, has not in any degree altered or affected the legal relation of the parties. It is the case of *Doe d. Bennett v. Hale*.\* The head-note to this case is:—

"There is no rule of law requiring that counsel, appearing in Court for a party who pleads in person, should be instructed by an attorney. Therefore, where a judge at Nisi Prius had ruled that counsel appearing for such party, and not instructed by an attorney, could not cross-examine or address the jury, the Court granted a new trial, but the usage which has prevailed at the Bar, that counsel, unless in some excepted cases, should take their instructions from attorneys only, is beneficial and ought to be maintained."

Lord Campbell, C.J., in the course of the argument, says (p. 174) :—

“The etiquette of the Bar is one thing, a practice which is to bind the world another.”

Lord Campbell thus delivers the judgment of the Court (p. 182) :—

“There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney, and I believe that it is for the benefit of the suitors, and for the satisfactory administration of justice, that this understanding should be generally acted upon. But we are of opinion that there is no rule of law by which it can be enforced.”

And again (p. 185) :—

“I highly approve of the demarcation finally drawn between the functions of the attorney and those of the counsel, and I believe that the intervention of the attorney between the counsel and the party has greatly contributed not only to the dignity of the Bar, but to the improvement of English jurisprudence.”

And again (p. 186) :—

“And their intermediary agency between the parties and the counsel, so conducive to the due administration of justice will, I hope, remain unimpaired.”

It therefore appears that, with certain exceptions which serve to prove the general rule, the attorney or solicitor, on all occasions and under all circumstances, is simply the agent of his client, the principal. Indeed, the very word “attorney,” according to the definition given of it by Lord Coke, means one who acts in the place or stead of another. It is one of the oldest agencies known to the law of England. We may here observe that the rule as to pledging credit does not apply to the present case. Where in the olden time a client retained counsel direct he did not pledge his own credit, but only created a moral obligation, but where either at the time or

subsequently he added a promise, there arose a legal obligation. In like manner at the present day, an attorney who retains counsel on behalf of his client does not pledge the credit of that client, but only raises a moral obligation, but where he adds a promise, then a legal debt arises as against his client, the principal. It is the union of two distinct things, neither of which standing alone will suffice, which creates the legal debt. Otherwise, if a different rule prevailed, then the attorney or solicitor would become the employer or principal, and a barrister would be placed in the same situation as one attorney doing another attorney's work, which would be a most undignified position for him to occupy.

In the case of *Mostyn v. Mostyn* the decision in which has occasioned this article, the counsel sought to establish against the client as principal a contract entered into by the solicitor as agent. Part-payment was relied upon to supply the promise. The facts were not in dispute, but the question simply was whether the debt admitted to be honorary was also legal. The estates of client and solicitor, who were both dead, were under administration in the same branch of the Court, and though a sum had been agreed to be paid in discharge of the bills of costs outstanding, yet the legal right being established, the equities could be adjusted in chambers, and the estate of the client made to pay the fees, direct or by way of retainer out of the sum agreed to be paid to the estate of the solicitor, as should be right, so that there would have been only one payment by the client of fees admitted to be just and proper in respect of non-litigious business. The Court, however, disallowed the claim. The counsel was no doubt unfortunate in being compelled in consequence of the suit for administration to resort to a tribunal, which from time to time confesses itself unable to deal satisfactorily with legal questions. With great respect for the Court of Chancery we are of opinion that such an obligation in a court of law, where the principles regulating contracts are better understood and more recognised, would have been held to be

legal. We do not propose, however, to criticise the judgment of the Court of Chancery, because the authorities cited in support of the claim were not investigated, nor the reasons on which they were founded examined, but the Court appears to have been guided simply by the view that it was inexpedient at the present day that counsel should under any circumstances be able to sue his client. Since, however, this view of expediency would be likely to have some weight attached to it, even in a court of law, we propose in conclusion to say a few words on this head.

In the first place, in none of the old cases to be found in our books is there any comment or observation by the judges as to the inexpediency of the counsel coming into Court to establish his claim. In each case the contract was considered on its own merits; where it was established to the satisfaction of the Court, there it was allowed to be carried into effect, and where otherwise of course it failed. Not only ordinary barristers sued their clients, but those in whom special confidence was reposed, and who had acquired a certain position in their profession, as evidenced by the special annual retainers they held, and which they did not scruple to enforce. Again, we find now a sergeant-at-law, and then a bencher of the Inner Temple, suing his client without provoking any observation. In the modern case also of *Hobart v. Butler*, when the rule of etiquette at present prevailing as to receiving business only from attorneys or solicitors, had been long established, the judges, so far from rebuking the counsel who sued his client, though for a very small sum, expressed towards him the greatest commiseration, and gave elaborate reasons in their judgments to show why, according to the law in that particular case, the alleged contract could not be enforced. Therefore for the courts at the present day to refuse to allow a counsel to enforce a legal contract against his client would be to place on his back a burden which his forefathers were not called on to bear in the brightest and most brilliant periods of our forensic history.



There is an objection also which might arise to a counsel being allowed in any case to enforce a legal obligation against his client, namely, that it would be, to use a common saying, "the thin end of the wedge," and that if once the general rule were infringed, there would gradually arise a desire that barristers, like others who do work of any kind, should in all cases have a legal right to remuneration. To this objection we may answer that in old times, when such actions undoubtedly prevailed, as a fact the custom or etiquette of the profession as to fees being honorary never was affected, but remained unimpaired. *Exceptio probat regulam.* We think, moreover, that it would be advantageous alike to the public and the profession, if clients were occasionally reminded practically of the existence of a class of men to whom they owe so much. At the present day also, when the Bar are retained exclusively by attorneys and solicitors, there is danger of their drifting away too much from the client, and hence forgetting his interests. Both would be benefited if the tie were rendered closer.

However, too much importance should not, we think, be attached to the circumstance that the debt to counsel is simply a moral obligation. The rule has been relaxed as regards physicians by legislative enactment, and yet no one we think would suppose that this body of men have suffered thereby either in position or status. It is important indeed that the duties of counsel should be honorably performed, but whether the remuneration for them be honorary or legal is a mere shadow. We approve indeed of the existing general rule, because it prevailed in Greece and Rome in remote antiquity, and has been adopted and handed down by our ancestors, but to rest the dignity of the Bar on such a basis would be to place it on a foundation of sand. By reason of impending changes, barristers are likely to be scattered through the length and breadth of the land. They will no longer appear at intervals only at the assize towns, surrounded by all the paraphernalia of justice, and again to disappear into the crowd

of London, but their lives will in future be spent more in the broad light of day. They will be met oftener than formerly amid festive scenes and social gatherings, and will come constantly under the observation of their fellow men. When we remember of what stuff barristers are made, that they are recruited from the best blood of the land, that the fondest parents send their clever sons to join the ranks of the Bar as the fittest arena for the exercise of their abilities, we have little fear that they will come well out of this fiery ordeal, but if so, they must put their trust in realities. Their private lives as well as their professional conduct must be without shame and above reproach; in fine they must possess those qualities which united combine to form the character of the honest, fearless, independent English gentleman.

#### ART. IX.—BENEFIT BUILDING SOCIETIES.

*A Practical Treatise on Benefit Building Societies.* By ARTHUR SCRATCHLEY, M.A. Fourth Edition. London: C. & E. Layton. 1869.

*The Law of Building and Freehold Land Societies.* By HENRY F. A. DAVIS. London: H. Sweet. 1870.

*A Bill to Consolidate and Amend the Law relating to Benefit Building Societies.* Bill No. 116. House of Commons. 1870.

**I**N the Session of 1869 a Bill "to Amend the Act for the Regulation of Benefit Building Societies" was prepared and brought in by Mr. Gourley, Sir Roundell Palmer, and Mr. Stevenson. It had for its object the authorising Benefit Building Societies to borrow money, and to raise it by paid up, or deposit, or preference shares; and it provided for annual returns of the funds of every society. In the pre-

sent Session, the promoters of the measure have enlarged it into one for the consolidation of the existing law as to the societies in question, as well as for introducing these and other new provisions.

Both Mr. Scratchley and Mr. Davis are agreed as to the necessity of a consolidating Act. The latter author says of the Benefit Building Societies Act of 1836 (6 & 7 Wm. IV. c. 32), that it is remarkable that it should ever have been passed at all, or, having been passed, should have been permitted to remain in force for a single session. The unfortunate provision (says Mr. Scratchley) by which all the clauses of the old Friendly Societies Acts (10 Geo. IV. c. 56; 4 & 5 Wm. IV. c. 40), are incorporated with it, but only so far as they are applicable to the purposes of Building Societies, has introduced much complication and uncertainty.

The section in the Act of 1836, from which we are left to gather what a Benefit Building Society is, is a curious specimen of faulty and involved construction. It enacts—

“That it shall and may be lawful for any number of persons in Great Britain and Ireland, to form themselves into and establish societies for the purpose of raising, by the monthly or other subscriptions of the several members of such societies, shares not exceeding the value of one hundred and fifty pounds for each share, such subscriptions not to exceed, in the whole, twenty shillings per month for each share; a stock or fund for the purpose of enabling each member thereof to receive of the funds of such society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to such society until the amount or value of his or her shares shall have been fully repaid to such society, with the interest thereon, and all fines or other payment incurred in respect thereof.”

The early societies established under the provisions of this Act were small clubs, designed for temporary existence.

Gradually the inconveniences of the original plan became manifest; and when, in 1847, Mr. Scratchley published the first edition of the work now under review, and developed the plan of a permanent society, based on scientific calculations, the new system was largely adopted. The more it has grown the more impatient have the promoters of societies become of the restrictions which the Act places upon their operations, though the force of these restrictions has been weakened by successive judicial decisions.

For example, it is not an unreasonable construction of the section just quoted, that the framers of the Act intended that no person should have an interest in a Benefit Building Society exceeding 150*l*. This was the inference drawn by the judges in the case of *Cutbill v. Kingdom*,\* but as the point was not judicially before them, the expression of opinion in that case is of no authority. When the question came to be decided, in *Morrison v. Glover*,† it was held that one "member" may hold any number of "shares;" and thus the machinery of Benefit Building Societies has been employed for transactions involving several thousands of pounds on an individual security.

Again, the society in the contemplation of the framers of the Act was (it would seem) a mere mutual saving fund, with no dealings with the outside public. The members would contribute each his little quota, till enough was raised to make a loan to one of them. But by the case of *Dobinson v. Hawkes*‡ it was decided that moneys of a Building Society may be lent to persons not members.

So also with respect to the borrowing of money for the purposes of the society. No indication appears of any intention in the Act that the society should have the power of looking to any extraneous funds whatever. Had such an intention existed, it is hardly to be supposed that

\* 1 Exch., 497.      † 4 Exch., 430.  
‡ 16 Sim., 407.

no provision for regulating, limiting, and defining the borrowing powers would have appeared in the Act.

With respect to all these matters, the development of fact, and practical convenience have gone far to modify that which would probably otherwise have been the dry legal interpretation of the Statute. In respect to the borrowing of money, it is a matter of such vital importance to many societies, and so largely contributes to the speedy and satisfactory fulfilling of their functions, that it is now placed beyond a doubt (by the Court of Appeal in Chancery)\* that a rule authorising it is allowable. Lord Westbury, however (no mean authority), gave an opinion in 1857, when Attorney-General, that a rule authorising the borrowing of money was repugnant to the principles of a Benefit Building Society.

The supposed absence of a borrowing power during the period between the giving of Lord Westbury's opinion and the recent decision, has led to large infringements of the limitations of the Act in another direction, though without any legal warrant. It has been the practice in many societies to issue "paid up" or "preference" or "debenture" shares, purchased by a single payment and bearing interest. This is only another form of borrowing, and is quite at variance with the provision in the Act, that the funds are to be raised by the "monthly or other subscriptions of the members, not exceeding one pound in the month per share." A check has recently been placed on this practice by the refusal of the barrister to certify any rules which do not explicitly contain this limitation.

The Bill before Parliament cuts the knot of all these difficulties by omitting all limitation of the amount of share, or of the amount of monthly contribution, and by expressly giving to all societies (whether they have a rule for the purpose or not) the power to borrow money in aid of their funds. So complete is the absence of restriction that no

\* *Living v. Reed*, Law Rep. 5, Ch. App. 4.



limitation is placed even on the power to borrow. This is an omission which will probably be supplied before the Bill passes into law.

An unlimited power to borrow is fair neither to the lenders nor to the members whose funds and credit are pledged. Lord Hatherley (in *Laing v. Reed*, already quoted) said—"if the rule had been a rule by which the society were authorised, through the medium of their trustees, to raise an unlimited sum of money, wholly regardless of all those contributions which might be made by the members, that, no doubt, would be contrary to the intention and scope of the Act of Parliament." The lamented Lord Justice Giffard in the same case implied that an unlimited power to borrow might, in effect, make the society a thing different from a Benefit Building Society.

The same argument has been pursued in two very recent cases by Vice-Chancellor Malins,\* and it is so consonant to common sense and to fairness, that it will doubtless meet with attention during the progress of the measure in question. The limitation which was approved by the Court in the case of *Laing v. Reed* was as follows:—"The total sum of money to be borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society, including the mortgage or mortgages for which such advance or advances shall be required." The practical effect of this is that the borrowed capital used might be twice as much as the amount of capital belonging to the members; a limitation which does not err on the side of severity.

It does not appear to be probable that the Bill will be passed into law during the present session. Its further progress is proposed to be arrested by Sir Michael Hicks Beach, on the ground that the Building Societies Act has been adapted and applied to purposes so extensive, and in some respects so foreign from its original intention, that

\* *Hill's case* and *Jones's case*, Law R., 9 Eq., 617.

further inquiry is necessary before legislative sanction is given to the sorts of partnership that have resulted. While it cannot be denied that there is some practical force in this objection, it seems a pity that societies, which comprise many thousands of members, and deal with many millions of money, should be retained for another whole year in the position of doubt as to the legality of many of their proceedings in which they are now placed.

Among the amendments proposed in the law relating to Benefit Building Societies which are most urgently needed, is the establishment of a system of registration similar to that which exists for Friendly Societies. Benefit Building Societies are still subjected, as far as the conditions requisite for their formation go, to the provisions of the Friendly Societies Act of 1829, as amended by that of 1834; while, with regard to Friendly Societies, a wholly different system has existed since 1846. When once the certifying barrister has granted his certificate to a Benefit Building Society, his concern in its affairs is at an end. A transcript of the rules is sent to the Clerk of the Peace for the county, and no register whatever is made in the barrister's office. The society, once formed, cannot change its name, cannot remove its place of business out of the county in which it was originally established, is not required to furnish any returns, and never again comes within the official knowledge of the barrister, except in the event of an alteration of its rules.

With regard to Friendly Societies, on the contrary, the officer certifying is a registrar; he is bound to make an entry of the society's existence on a record kept by him, and he retains the duplicate of the rules in his own possession, open to the inspection of any person whatever, without fee. He can record changes of the place of business of the society, approve changes of its name, and enforce the annual transmission of returns of its operations. He keeps a record of the names of the trustees, and his certificate, verifying a copy of any document in his official possession, is conclusive evi-

dence of its contents. These provisions, valuable as they are to Friendly Societies, would be at least equally so to Benefit Building Societies.

This distinction between the functions of the Registrar of Friendly Societies and of the barrister certifying Building Societies sometimes escapes the learned authors of both of the works under review, who seem to prefer to use the term "Registrar," which is a wholly inaccurate expression with regard to a Benefit Building Society. The registrar, if any, would be the Clerk of the Peace who files the rules on his roll; but, in point of fact, Building Societies are not registered at all.

A further amendment of the law, which admits of no unnecessary delay, is the providing some means of voluntary winding up for Benefit Building Societies. At present, these societies are compelled, when overtaken by misfortune, to have recourse to winding up compulsorily by the Court, under the Companies Acts. In the view of those Statutes they are simply "unregistered companies," and the provision for their winding up is contained in Part VIII. of the Companies Act of 1862, which expressly provides that an unregistered company shall not be wound up either voluntarily or subject to the supervision of the Court, but shall in all cases be wound up compulsorily by the Court. The loss which many societies have suffered by the enormous law costs thus incurred must have greatly added to the severity of the misfortune which at first drove them to the Court.

The section in Mr. Gourley's Bill, which is directed to remedy this mischief, and to enable societies, when they find that (from miscalculation or mistaken investments) they cannot succeed in carrying out their original intention, to make the best of their circumstances, and agree upon a gradual liquidation, is as follows:—

"A society under this Act may be wound up voluntarily by the votes or consent of five-sixths of the members, to be testified by their

signatures to the proposed plan of dissolution, which shall set forth the intended appropriation and division of the funds and property of the society; or may be wound up compulsorily by the court, if the court shall so order, on the petition of any member authorised by a general meeting of the society to present the same on behalf of the society, or on the petition of any creditor, but not otherwise. General orders for regulating proceedings under this section may be from time to time made by the authority for the time being empowered to make general orders for the court. In the absence of such orders, the general orders for the time being regulating the winding-up of companies shall apply as far as may be to proceedings under this section."

Mr. Scratchley's work is the fourth edition of one which has been long before the public, and has earned for itself and its author a very high reputation. As a practical guide to directors and shareholders through the intricacies and dangers of the business transacted by these societies it has never been rivalled. It contributes to the law of the question a concise alphabetical digest of the decided cases and of the sections of the Acts, which must be most useful for ready reference, as well as some preliminary remarks, setting forth the alterations required in the law.

Mr. Davis's work also merits the highest commendation. Its aim is to furnish a complete treatise on the law of these societies, and it discusses, at ample length, every case bearing on the question. If, as we gather from the preface, the author is a student in the profession of the law, his work gives promise of his hereafter rendering it no slight service. He has dealt with a subject which, in most hands, would have been trite and commonplace in a manner at once original and thorough.

The principal suggestion we have to make for Mr. Davis's second edition is that he should omit all the learning which he has founded upon the consideration that the 9 & 10 Vict. c. 27, may possibly apply to Benefit Building Societies, since he has himself shown most conclusively (p. 4) that it cannot so

apply. We make this suggestion because that consideration seems to contribute to the confusion between the certifying barrister and an imaginary registrar, which occurs in his work. We should also like to see him adopt the statutory title, "Benefit Building Societies," instead of the popular "Building and Freehold Land Societies," which is not known to the law.

ART. X.—THE ADMINISTRATION OF JUSTICE  
IN INDIA.—No. I.

"PARTLY from an economical cause, but in very great measure from the action of the Civil Courts, the whole of the peasantry of this Presidency were for nearly two generations crushed under a load of debt. They attributed their calamities entirely to British administration; and the Mahratee proverb 'the pest of Courts,' shows their feeling." This is a quotation from a report in reply to a circular from the Government of India virtually calling for opinions and reports laudatory of British as opposed to Native administration.

The circular said that his Excellency the Governor-General is of opinion that the masses of the people are incontestably more prosperous and far more happy in British territory than they are under Native rulers, and he considers that the present would be a good opportunity for proving this belief by a concentration of statistics from different parts of India.

Every one who pretends to any knowledge of the system condemns it in the strongest terms. We quote some of the expressions used in the various replies to the Governor-General. "For every instance of insecurity of life and property in the Native States the Patels quote equally distressing cases of respectable families impoverished and ruined by the action of our Civil Courts, or of notorious murderers let loose upon society owing to some legal quibble." "The introduction of our Courts into the territory of the Gaikwar



would be to deprive his subjects of the solitary advantage they had over the subjects of the English Government." "The niceties and technicalities of our Courts perplex and harass them." "They think that our system of repressing crime is less efficacious than that pursued in Native States." "Petty crimes, forgery and false evidence are fostered in our Courts."

These reports are made by officers chiefly in the Civil Service, and unconnected officially with the administration of justice. They speak of the results from their experience, acquired by mixing among the people themselves, and there can be no doubt that they truly express the feelings with which the people of India regard the Courts of Law. The Native press teems with expressions of opinion as to what is called "Mofussil Justice;" the language of the English press is, if possible, stronger than that of the Native press. In fact, what is the most remarkable thing in every article on the subject is, that the writers seem to find a difficulty in putting together words sufficiently strong to express all that they feel on the subject. "An ulcer which must spread and fester until it eats into and rots the very body of society." "The most enormous evil of modern times." "An offence to God and man." "The great schools for perjury."

Such are some of the expressions used by the public. It is not however our intention to go at any length into the question of the view taken by the outside public as to the matter. What is universally said and believed may be as a general rule taken to be true, but we need not go to public opinion in order to ascertain what is the system of the administration of justice in India. We have better evidence than that. We have the evidence of the judges themselves, and it is to what they say of the system that we intend to direct attention. In order to understand the full force of the remarks and opinions of the judges, it will be necessary to understand something of the system of courts, as it is there chiefly that the evil, we think, will be found to lie. The system is such as would not be endured for a

single day in England, and for the very same reason that it is unsuitable for England, it is in our opinion quite as unsuitable for India.

The courts in India are divided into three classes: the Subordinate Courts, District Courts and High Courts. The territorial jurisdiction of a District Court is as nearly as possible the same in extent as an English Circuit, and that of a Subordinate Court the same as a County Court Judge's Circuit. A district in Bombay averages for example 7965 square miles, while the average size of an English Circuit is 8244 square miles. Again, a County Court Judge's Circuit is in England 979 square miles, while that of a Subordinate Judge in Bombay is 1049 square miles.

In Bengal the districts are somewhat smaller than in Bombay, and in Madras they are rather larger, but as a general rule all over India an English circuit and an English county will give a sufficiently accurate conception of the Indian judicial divisions. If we imagine further the judges of the Superior Courts perpetually on circuit, or rather permanently stationed at the chief town in their circuit, we shall have the Indian system of courts complete. The County Courts would correspond to the Subordinate Courts, the Circuit Courts to the District Courts, and the Courts of Appeal to the High Courts.

So far, the systems are sufficiently similar. It is when we come to inquire into the jurisdiction of these Courts that the grand distinction becomes evident. That distinction is this, that whereas in England County Courts hear petty debt cases only, in India the Subordinate Courts have unlimited jurisdiction. All other courts in India are mere Courts of Appeal. Cases which in England are tried by the Courts of Queen's Bench, of Exchequer, of Common Pleas, by the Courts of Chancery, Admiralty, and Divorce, are tried, and by the existing law can only be brought, before the Subordinate Courts in

India. Whether the parties are Europeans, or whether they are natives, whether the action is by a landed proprietor for his ancestral estate, by a bank for the winding-up of its affairs, or by a shopkeeper for the pettiest debt, there is only one place where it can be tried, and that is a Subordinate Court. We have only to add to this, that the emoluments of the office of the judges of the Subordinate Courts in India are averaged at one-tenth of that of an English County Court Judge, and that the officers of the Court are paid on a similar scale. The whole establishment in Bengal costs in some courts as low as 90*l.* a year, including the salary of sheriff and cost of stationery.

In fact the whole of the Subordinate Courts are worked at an enormous profit to Government. In Bombay, for instance, the income from stamps and taxes levied by Government from these Courts in one year is 133,543*l.* 8*s.*, while the expenditure is only 55,988*l.* Nearly two-thirds therefore of the income of the Courts of first instance is taken by Government as profit, and credited to the general revenue. It charges 3*l.* for justice, which costs it little more than 1*l.*

In order to complete the picture, we have only to glance at the Bar, about which we shall have something to say further on. Under the present system it is impossible that there ever should be a Bar of any standing in the Subordinate Courts. The practice in each of these Courts consists on an average of 100 petty debt suits a month, and say, ten or twelve other cases. A fat case occurs perhaps once a month, and the other small cases are not worth having. The occasional big suits that are always cropping up amongst the general run of petty debt cases interfere with the rapid disposal of small cases to an enormous extent. So much is this the case, that while in England, the average number of cases got through by each judge is about 12,000, in India it is only about 1,000. This includes every plaint filed of every description, whether the case is a small cause or not.

The calculation in India is made on those courts only which are exclusively employed in the administration of justice.

If the whole of the original cases that arise in the Courts of Chancery, Superior Courts, and County Courts in England were indiscriminately distributed among upwards of 1000 scattered County Courts according to the Indian system, the Bar in England would be immediately ruined as a profession; and so long as the system lasts in India, the establishment of an able Bar is out of the question.

In the three cities of Bombay, Calcutta, and Madras, the system of Small Cause Courts for small causes, and of Superior Courts for those of greater difficulty and importance exists, and the result is that in each of these towns there is a Bar of very great ability. English barristers who come out to India as a rule confine themselves to these Courts. They find that there only can they get a regular succession of cases sufficiently important to provide them with remunerative fees. If the same system were introduced into the Mofussil, if every District Court heard all the heavy cases only, there would be nearly twice as much practice in every district of India as there is in the presidency towns. In the town of Bombay there are 1260\* Superior Court cases in the year; in Calcutta, 800; and in Madras, 577; while in every district of India there are, on an average, about 2000 such cases. What is perhaps an additional attraction, there would be practically no competition. An English barrister who had just kept his terms would, as a matter of course, lead the Bar in any district in the Mofussil, with his choice of the best of 2000 suits, and such fees as would make the mouths of most English barristers water. A reform which would induce a large influx of barristers permanently into the Mofussil Courts would, we feel convinced, do more for the raising of the character of the administration of justice in India, than any other step that could be taken. As it is, a respectable Native barrister even considered it not worth his

\* Administration Reports for 1858.



while to practise in the Mofussil, and certainly under the present system it is not. Occasionally both they and English barristers make a trip into the Mofussil for special cases, and receive fabulous fees for so doing, but there is no court under the present system where there is a regular succession of paying cases, and a flying visit is therefore all that a pleader or barrister of ability can afford to make. These flying visits are becoming daily more frequent, and they would even now be more so still, were it not for a pernicious habit the Subordinate Judges have of constantly adjourning the cases pending before them, so that a party has no security that if he engages a barrister for the day on which his case is set down for hearing, his services will be of any use to him, as the chances are that the judge after an examination of a witness or two grants an adjournment for some reason altogether insufficient.

It may be said that it is not quite accurate to describe all the Subordinate Courts in India as Courts of universal jurisdiction. This is so far true in that they are divided into various classes. In Bombay there are two such classes of courts; one whose jurisdiction is limited to cases under 500*l.* in value, the other class with unlimited jurisdiction. A somewhat similar distinction is made in Bengal, the limit there being 100*l.* In the North West Provinces, in Oude, in the Central Provinces, and in the Punjaub there are other distinctions. The number of Acts specifying these grades is larger than the whole of the Procedure Code.

It is not necessary to go into all the minute distinctions of jurisdiction prescribed by this enormous mass of legislation. It is sufficient to point out that the principle of the whole is one dependent on the mere money value of the suit, without any reference to the nature of the claim. The whole of the legislation for the ordinary Civil Courts in India ignores the fact which is recognized not only in England, in the Continental Courts, and in America, but which is recognized in the French and Portuguese Courts in India, and even in the



presidency towns in our own possessions, the fact, namely, that the main distinction of importance which can be drawn between cases suitable for an inferior court and those which require the highest judicial skill to determine, is that between cases which usually depend on mere questions of fact and those which do not. As it was put by the Honourable Mr. Maine, in the debate on the Small Cause Court Bill in the Legislative Council at Calcutta — “The principle which underlies the whole English system of administering civil justice is, that average capacity, and average integrity, and average good sense are sufficient for the solution of questions of pure fact.” Looked at in this light, the endless distinctions depending on the mere money value of the suit are absurd.

The division of the Subordinate Courts in Bombay is, probably, the most absurd of all, as out of upwards of 150,000 cases per annum arising in the various districts, all except forty are under 500*l.* in estimated value. As there are eighty-five county Subordinate Judges in the presidency, the number of cases above 500*l.* is less than half of a case for each judge. Although, therefore, theoretically there is a distinction between the jurisdiction of a first-class Subordinate Court and a second class, practically there is none, even admitting that a mere money test was a sound one.

The obvious result of this system of giving one judge jurisdiction in all causes is that there must be one of two evils. Either the judge is fit to try the more important cases and there is an enormous waste of power in giving him a host of petty claims to investigate, or the judge is qualified only to determine the comparatively easy questions that arise in Small Cause Court actions, and by consequence utterly incompetent to decide the heavier and more complicated cases. Whether the former of these evils prevails in India, or the latter and much more serious one, it is easy to determine. The evidence is overwhelming. The Indian press, the law reports, the circulars of the various High Courts all teem with evidence of the utter and com-

plete incompetence of the Subordinate Judges in India for the work of the Superior Courts of Law. In many cases indeed, the only inference that can be drawn is that they are quite unfit for any judicial business whatever. Mr. Field, of the Bengal Civil Service, has lately published a book which contains circulars issued from time to time by the High Court of Bengal since its recent institution. Similar circulars were issued by the Sudder Court previously, but we need not go further back than the institution of the High Court for evidence of the state of affairs as they exist.

These circulars, it should be recollected, refer only to Lower Bengal, but as that is the province most advanced in education and in the appreciation of our institutions, it may be considered as superior to the other provinces in respect to its courts of law.

The Circular Orders of the other High Courts in Madras, Bombay, and the North West Provinces contain expressions equally strong.

To us it seems almost incredible that in a country governed by Englishmen it should be possible that the judges of the highest courts in the land should say what they do in these circulars, with reference to the Subordinate Courts in India, and yet that nothing should be done by the Government, and no notice even taken of the matter.

The mode of taking evidence in the generality of cases is loose and unsatisfactory in the extreme, no reform whatever having been made in accordance with the Code.\*

By Section 172 of the Code of Civil Procedure, the judge is required to take down in writing the substance of the evidence of each witness and attach his signature to it, or record his inability to do so. As an instance of how far this requirement has been acted up to, a case decided by Nusseeroodeen Mahomed, Principal Sudder Ameen of Tithoot, is one in point. It was a case solely dependent on the

\* Circular Order, No. 23, 1863.

evidence, in which there must have been gross and rank perjury and forgery on one side or the other, and in which they are necessarily compelled to rely almost entirely on the finding of the judge who had the witnesses before him. The Principal Sudder Ameen's\* original notes were a disgraceful farce. The Court before which the case came on appeal, "believed that it is the common and ordinary practice to disregard entirely the rules prescribed by law for taking evidence." The Court, therefore, directed that a copy of this minute be forwarded with the original notes of evidence to the District Judge<sup>†</sup> for communication to the Principal Sudder Ameen, and a copy of the minute to all officers employed to take evidence.‡

In 1859 the particular attention of the Lower Courts was called to the rule relating to the examination of witnesses, in Section 172, of Act VIII., of 1859, and the judges were directed to take notice of all violations of the rule which should come under their notice.‡

In several cases which have recently come before this Court, "pressure of business," "excess of business," &c., have been recorded as reasons for not making a memorandum of the evidence as required by the Act. In other cases, there has been a mere short note, stating the result of the evidence of several witnesses together in a few words, the memorandum showing on the face of it that it could not have been made until after all the witnesses, of whose evidence the result was given, had been examined. These excuses were never intended by the Legislature to be considered as a sufficient reason or excuse for not complying with the Act.

In another case, tried before a late Principal Sudder Ameen, it was represented to the Court that the examination of a witness in one case was being taken down whilst

\* Native judge of the first class, with unlimited original jurisdiction and power to hear appeals up to Rs. 1000 (100l.).

† Circular Order of the late Sudder Court, No. 147, 1859.

‡ Circular Order, No. 81, 1863.

the Principal Sudder Ameen was listening to the argument of a vakeel\* in another case. Such a course of proceeding would be a clear violation of the Act.

These cases are given merely as instances to show how the Act has been disregarded in many of the Civil Courts in the Mofussil.

The Court, in order to express their determination that the provisions of the Act shall be strictly complied with in future, directed that, after the promulgation of the Circular Order, the following should be strictly observed by the judges of every grade:—That a judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read. It shall be the duty of every Appellate Court, subordinate to the High Court, to examine the memorandum of the evidence made by the judge of the court of first instance, and to report to the High Court in every case in which, upon the hearing of a regular appeal, it shall appear that the above rules have not been strictly and properly attended to. No excuse will be admitted for any wilful or negligent disobedience of the above rules, and the judge of the district shall report to this Court in every case in which a violation of the same shall come under his notice.

The Order enters fully into detail of the proper mode of conducting a trial, and the Court feels satisfied that, by a strict compliance with the rules, the administration of justice will be greatly improved.

Another matter which has attracted the attention of the Court is the manner in which cases are tried. Subsequent Circular Orders† report great irregularities and want of decorum in the Courts, and express extreme disappointment that the Court are constrained to record their belief that, notwithstanding their constant endeavours to ensure a strict compliance with the law regarding the proper record of evi-

\* Native barrister.

† No. 5, 1864; No. 10, 1865; No. 20, 1865.

dence and a proper trial of suits, many civil judges still neglect their duties.

In a recent trial the presiding judge recorded the following remarks :—

“The fact seems to be that his (appellant's) witnesses were in attendance for a long period, during which he could not succeed in getting them examined, although the case was many different times so far on for trial that one or two witnesses were examined on each occasion ; at last tired out, and the Mohurrum approaching, he prayed for a postponement, which was granted. On the case being subsequently taken up his witnesses were not ready, and it was then at once decided against him.

“I think that the record exhibits so systematic a disregard of the law, and of the orders of this Court, as to amount to a complete defect in law in the investigation, and to mislead the appellant, who might reasonably have expected that the same loose practice followed after the first appointment, would be followed after the second appointment, and that the witnesses would be taken any day. On that ground I would remand the case to the first Court for a fresh trial.

“From the nature of the case, and the record of the evidence, it appears that the one or two witnesses examined each day, could not have occupied the whole or any considerable portion of those days. It is clear that in the Court of the Principal Sudder Ameen, the law and orders which require that a case should be taken up in its turn at the appointed time, and then and there tried out, or regularly adjourned for sufficient cause, are the merest dead letter.

“The result seems to be that in truth the evidence is merely taken from time to time in a formal way, after the manner of affidavits ; and on another day (sometimes after a considerable interval) the Court goes over the papers, and decides upon the paper evidence. If that be so, the weight which we are accustomed to attribute to the opinion of the Court which hears the evidence becomes a mere delusion and snare (yet in this case the pleaders on both sides have in the most emphatic terms asserted as of their



own personal knowledge obtained in the most recent cases, that to this day the practice above described almost universally prevails in the Mofussil Courts). And I can well believe that if it is so in the Court of the Principal Sudder Ameen, under the very eye of this Court, it may be so in courts further removed from our observation.

“The proceedings of the Court of first instance, thus detailed, are directly opposed to Rule 9 of the Court's Circular 31, dated October 13, 1863, the terms of which are as follows:—‘After the examination of witnesses has commenced, the trial should be proceeded with until all the witnesses on both sides have been examined; those of the party upon whom the *onus* of proof lies being examined first, and then those of the opposite party, and an adjournment of the hearing shall not be allowed, except for sufficient cause, which shall be recorded. Particular attention is called to the last paragraph of Section 145, Act VIII., of 1859, by which it is provided that if the summons shall have been issued for the final disposal of the suit, and either party shall fail without sufficient cause to produce the evidence on which he relies, the Court may at once give judgment. The same rule is applicable after a day is fixed for trial.’ The Court, in again drawing the attention of all civil judges to the terms of that circular, warn them that, after this further notice, any transgressing officer will render himself liable to immediate dismissal from office, for the Court are determined to enforce their orders and the law, and they now feel that, without some severe example, this end cannot be attained.”

Another Circular Order of the High Court reports that it has now ample proof before it that very many of the cases referred by judges to Ameens for local inquiry never should have been so referred. With a view, therefore, of obviating the delay which occurs through a course of procedure not authorised by law, the High Court deem it proper to impress upon the Subordinate Courts of every grade that local investigations by Ameens should only be ordered in cases where they are absolutely required by the Courts on subordinate points, for a determination of the main issue in the case.\*

\* Order, No. 41, 1866.

“That the Court find it absolutely necessary to call the attention of Subordinate Courts of every grade to the Sections of the Code of Civil Procedure, applicable to the reception of documentary evidence, the laxity of practice prevailing on this head being productive of most serious inconvenience, and evincing in many cases total disregard of the wholesome provisions of the law.

“The inconvenience reaches a climax, when the importance of the suit and the determination of the parties bring about an appeal to England.

“The Court have too much reason to apprehend that, in the subordinate tribunals, practice is regulated more by daily habit and tradition, than by intelligent and careful study of the Code on the part of the judges themselves, of their ministerial officers, and of the pleaders; and, until that study has been fully and conscientiously established, the procedure of the Courts will not be what it ought to be, remands and reversals of decisions will be frequent, the course of justice will be impeded, and suitors will be harassed.\*

“It has frequently come under the observation of the High Court of Judicature that the decrees of Mofussil Courts are very far from ‘specifying clearly the relief granted, or other determination of the suit,’ as prescribed in the 189th Section of the Code.

“Very frequently the court is found to have ordered ‘that the suit be decreed in favour of the plaintiff, with costs and interest,’ or, ‘that the plaintiff obtain possession of the property mentioned in the plaint,’ while the commencement of the decree, instead of containing (as directed) the particulars of the claim as stated in the register of the suit, contains merely a vague description of the nature of the claim, such as ‘a claim for possession of lakhiraj land with wasilat,’ &c.

“And unfortunately the plaint itself in many cases is not as explicit as the law requires it to be, and thus it is occasionally necessary to look at the evidence, or at the written statements, in order to ascertain precisely what was the subject matter of the suit.”

Up to the very last, the same complaint has been made by the High Court as to the courts of original jurisdiction. The very last page of the last complete volume of the reports

\* Circular Order, No. 9, 1867.

for last year, contains the following judgment of Justice Jackson—

“I must say I am very much surprised to find ten years after the passing of Act VIII. of 1859, and after repeated injunctions and admonitions by this Court, that the Mofussil Courts still receive, without restriction and without discrimination, documents of every description which the parties choose to file in the suit in which they are concerned. . . . If the courts would only attend to the provision of the Code and the Circular Orders of this Court, and exclude from the record that which is either irrelevant or inadmissible, they would find their own decisions more to the point, and would save both the Appellate Court and the parties a great deal of time.”

The reported cases are equally full of evidence, showing the utter incapacity of the Subordinate Judges. To quote all the cases in which decisions, devoid not only of law but of common sense, have been given by these judges, would require volumes. We regret that our space will not admit of going into the particulars of these cases, interesting as they would be, as showing in many instances a want of knowledge of the law in many of the judges, and a reckless indifference to the rules of procedure. In order to show how numerous they are, we will confine ourselves only to a statement of their number, namely, twenty-three, decided in a single year. These related to only one province, and only those cases in that province which have come before the highest Court of Appeal, and which have been published in the printed reports. These cases were tried by the Subordinate Judges, of the first class, last year, in the province of Lower Bengal. Any other body of cases than those we have taken would yield quite as large a crop of absurdities. We purposely, however, confine ourselves to the oldest and most advanced province, to the most recent year, and to the highest class of judges, so as to avoid making an unfair selection. The cases which we have mentioned require no comment, they speak for themselves, and we believe that it would be impossible to find in any civilised country in the

world a mass of decisions so utterly idiotic, and so incredibly puerile.\*

So far we have treated these Subordinate Courts in the light of their fitness in an intellectual point of view, but there is a still blacker side to the picture; doubt is felt in many cases of their integrity. We will let the facts speak for themselves. So recently as last year in the North West Provinces, a Subordinate Judge, called Neaz Mahomed Khan, was tried for corruption and bribery. The facts of the case as they came out in evidence are thus described by the *Friend of India* of the 13th May last (1869):—

“ His career of roguery, though extending over little more than a year, lasted long enough to banish justice from his district. In the words of a witness, ‘ every child for twenty miles round knew that the Moonsiff (Subordinate Court) was an open doukan (shop.)’ Shortly after his arrival a Mahajun (banker) trumped up a charge of dacorty (gang robbery) against the Zemindars of the town, and the Moonsiff (Subordinate Court judge) exerted the whole of his official powers to support the accusation. Honest witnesses were intimidated, perjury and forgery were abetted and protected, records were systematically falsified, tradesmen’s books were demanded, not for the sake of testimony, but that the Moonsiff might shape his extortions according to the ability of the litigants, and with such skill was his fraudulent conduct concealed, that hardly one of his decisions met with a reversal in the higher courts.”

After detailing how he was at last discovered by a clever police inspector, the article continued :—

“ Is the case of Neaz Mahomed singular ? The people of Makoba appear to have regarded corruption as a perfectly legitimate course for the Moonsiff to pursue, or were afraid to complain, although the whole district rang with accounts of his venality, and no less than twenty-one distinct cases of bribery were discovered when the officers made investigations. It is evident then that we are not to look to the natives for the exposure of injustice and corruption, and the

\* These cases will be found in the Calcutta Reports for 1869.

judges who can only preserve their character with their English superiors are independent of the consideration of those who throng their courts. Nor can we look to the Appellate Courts, which in this instance were so systematically deceived. Mr. A. C. Tupp, the assistant magistrate, who prosecuted this case for Government, remarks on the helplessness of these courts to check corruption and injustice. He declares that there is reason to fear that 'the falsification of evidence too often occurs in Native Courts.' "

What is perhaps, however, more significant on this point is the Circular Orders, that it was considered necessary by the Superior Courts from time to time to issue. Here is one as a sample, issued to the District Judges by the Bombay Court.

"It having been brought to the notice of the judges of the Sudder Dewanee Adawlut, that a serious defalcation has been discovered in the treasury of the late Moonsiff of Hurnee, in the Conkun Zilla, I am directed to call your attention to the necessity of adopting such measures as may impose a check against malversation, and to inform you that on all occasions in which Moonsiffs are entrusted with the charge of intestate property, security should be taken from them, as from others so intrusted, in order to guard against loss."

In other words the judges of the Supreme Court of Appeal thought it necessary to take measures to prevent the Moonsiffs from picking and stealing the Government money, and yet it is to these very men that universal jurisdiction in civil suits is given.

We must not omit, however, to add the gilding which the pill required. After directing the District Judges peremptorily to take security from all Moonsiffs, to prevent them from stealing (well, say malversation), the Registrar says:—

"I am directed to observe, that although the misconduct of one individual has rendered it necessary to issue these instructions, yet that the confidence of the judges in the purity of the native judicial functionaries generally is not diminished."



Another Order of the same Court directed the Monsiffs on no occasion to keep more than Rs. 100 (10%) in their treasuries. There are similar Circular Orders on the files of the other Courts of Appeal. What we have quoted will give a sufficient idea of their character.

From what the judges of the Calcutta High Court say of the work done by the courts of original jurisdiction, it is easy to understand what is the character of practitioners when such things are possible. We will quote only one or two authorities who speak directly their opinions in regard to them. That of Mr. Campbell, the author of "*Modern India*," is sufficiently short and comprehensive. He describes the whole body of them as "professional rogues." The next opinion to which we will refer is that of a County Court Judge, himself a native, and therefore not likely to be prejudiced against the native pleaders, and from his position having the very best opportunity of judging. The opinion entertained by this native judge is contained in a small work, edited by him, called the "*Vakeel's Guide*," and published for the purpose of enabling the pleaders to discharge their duties more efficiently. In the preface he quotes the following from the *Madras Times*, as showing his own opinion in the matter :—

"A suitor, dependent on his native vakeel, often suffers than otherwise from his stupidity and ignorance, and from what I may call his over-pleading and over-advocacy. The native vakeel presses every weak point of his case on the Court, and flings on its face as evidence every irrelevant stuff that his client may choose to put before him, even matter that does him positive harm; and with an opposing pleader of no greater intelligence or ability, the presiding judge is left without any help to arrive at the merits of the case, and, no wonder, allows this stuff to creep into the record, and perhaps finds out when too late, if at all, that he has to go through and observe upon a mass of matter which has no more bearing on the land dispute before him than on the adultery case tried the other day.

"The vakeel is no adviser of his client, but literally his mouth-piece. If his friend wants to bring a suit, 'Bring it,' says he. If he wants to appeal against a decree, 'By all means,' says he. When asked by the judge how he consented to such-and-such trash being adduced as evidence, his answer frequently is, 'My client asked me to do so, he is a poor man, he has a just cause, and the Court must have compassion on him.' This is the climax of his eloquence.

"He presses every point, or rather everything (for there is no point at all in the thing) that his client wishes him to say, and the more irrelevant it is, the greater the earnestness with which it is dwelt upon, so as effectually to keep out of view points or facts that really tell for his client. His pleading, if it may be so called, more resembles the talk of an unsophisticated villager relating his grievances to his village head, who personally knew every fact connected with the story, than the address of an advocate who has endeavoured to knead it of all its weakening, irrelevant, and injurious matter, so as to present its strong features to one who can form no judgment on the case, except from the facts admissible in evidence.

"Such is the class and quality of advocates to whom the Mofussil population are obliged to trust their cases, men as ignorant as themselves; and who can for a moment doubt that their supersession by men of a superior order, by English and native gentlemen of legal education and standing, would not only be a great advantage to the Mofussil suitor, but would prove of immense help to the judge?

"No language can be too strong to depict the sad miscarriage of justice that takes place every day in consequence of the mischievous ignorance of the men who have now the conduct of litigation in the Mofussil."

Such is, according to a native judge in Madras, a correct description of the conduct and the abilities of native pleaders in that presidency. We will quote next the opinion of a civilian judge in Bombay. That opinion was given in a letter addressed to the judges of the Sudder Adawlut, and shows the system as it existed in other respects, as well as in regard to the vakeels.

"I beg," he says, "you will do me the favour to lay before the judges the following report, which a sense of duty compels me to forward.

"Soon after I took charge of my office in March last, I found myself oppressed with miscellaneous business, that occupied much more of my time than I could spare from other branches of my duties. I found after a short time that this press of business proceeded from a system of unsound litigation, where parties endeavoured to over-reach each other by every means of chicanery and fraud that could be resorted to, particularly in the execution of decrees of the Civil Courts, so that the honest suitor who obtained a judgment in his favour was as far as ever from procuring the legitimate object he set out with, and would probably be involved in delays and fresh actions, that in the end would tire him out with expenses and trouble.

. . . . .  
"The particular object of this address, however, proceeds from a desire on my part to show what I have found to be the actual working of the system in the Civil Courts within the city of Surat. The grossest frauds, attended with the most barefaced forgeries and perjuries that can be contemplated, are daily exhibited. Indeed the scenes that have been practised beggar description.

. . . . .  
"From what has come under my own observation in the appellate branch, it appears to me that the bands of wicked men who resort to the Adawlut to satisfy their base ends, have considered it in the light of an arena for gambling, where parties tried their strength, and the most wicked and cunning gained the day, for the same evil ends are resorted to, to rebut claims as were used to advance them.

"This stain upon our administration I have used my utmost endeavours to put down. I have on every occasion that has fairly come before me done my best to bring the guilty to punishment, and I shall not relax in the course I have adopted. I have before me fair grounds for hope, that instead of being an engine of oppression and tyranny, the Civil Courts will be resorted to for the legitimate object for which they were instituted, the protection of men in their just rights.

"I am concerned to say the vakeels (pleaders) aid in these enormities in a full and complete manner. Three of them have already been convicted and sentenced to punishment for being deeply implicated in conspiracies to defraud. . . . If these men had honestly discharged the important trust reposed in them, I should not now have the highly unpleasant and painful task to perform in addressing the Sudder Dewanee Adawlut in the way I do.

"It is in a great measure to the cupidity of these men that I attribute much of the vice that has pervaded the Court.

"I understand regularly organized bodies existed of forgers and persons who would swear falsely. It is even said that very many entirely subsist by these means. The rewards, so far as I hear, were small in general, which may be taken as a sure proof of the great extent to which the crime was carried."

The writer then goes on to give certain details of cases of perjury and forgery, in two of which vakeels were convicted.

What sort of qualifications a vakeel was expected to have may be seen from the Circular Orders issued by the Bombay Sudder Adawlut on the subject.

In 1821 they directed that one or more copies of the Regulations shall be given into the custody of the Government pleaders for the use of the vakeels generally, and the Government pleaders are to be held responsible for their due preservation. This is equivalent to a direction that the leader of the Northern Circuit should be presented with one or more copies of say, "Stephen's Commentaries" for the use of the whole of the practitioners in all the courts of the circuit.

There is only one Government pleader in each Indian circuit, or district, and the regulations consist of a very concise and imperfect code of laws, drawn up for the administration of justice, consisting of one or two hundred pages of large type. The next Order was made in 1832, in which a certificate of respectability was required.

In 1845 an advance was made in the matter of the regulations. They directed that—

“Every candidate for the office of pleader would be required in future to produce a certificate of having purchased a copy of the regulations for his personal use, previous to the issue of a sunnd (patent) to him, it being determined that this be imposed as a condition on all persons offering themselves to practice as vakeels in future.”

In 1846 the District Judges were informed by the Sudder Adawlut that—

“It was considered indispensable that candidates for pleaderships should be well acquainted with the Balbodh (printed) character, in which the great majority of the regulations are printed.”

They were to use the following form of certificate :—

“It is hereby certified that I have examined the bearer, A B, inhabitant of —, and find that he is — years of age, is of respectable character, reads Balbodh well, and he is otherwise properly educated.”

We presume that by being “otherwise properly educated” the judges refer to the remaining two R’s. He must be thoroughly grounded in reading, and have a fair knowledge of writing and rithmetic. The order about the purchase of a copy of the regulations does not appear to have been attended to, as the judges again in 1850 issue another Circular requesting that “care be taken to ascertain that the candidate possesses a copy of the regulations in the vernacular, or otherwise he will not be examined.”

The last Order had so little effect that a further one had to be issued in 1853, in which the judges of the Sudder Adawlut say that—

“Eighty-one candidates were rejected at the examination in consequence of their certificates not fulfilling the requirements of the Circular Orders 50 and 204 (prescribing the nature and form of certificate) and Nos. 199 and 258 requiring candidates to be possessed of copies of the regulations, and more stringent instructions are given for the future.”



The last Order with reference to the qualifications of pleaders was made in 1868, and was much to the same effect as the previous ones, so far as regarded the general education which the future vakeels were expected to have.

As to the officers of the Subordinate Courts, to those who know India, or indeed to those who know human nature, it should be sufficient to state that in these Courts, exercising the enormous jurisdiction which we have described, a great number of the officers are unpaid, and the others receive a miserable pittance, which is totally inadequate. In the court of a District Judge there are five unpaid officers, in that of a Subordinate Judge of the first class three, and of the second class two, unpaid officers.\* The remaining officers of these so-called Subordinate Courts get salaries ranging from 10s. to 5*l.* a month.†

That they are in the daily habit of taking bribes is only what is to be expected under the circumstances. The Madras native judge, whom we have already quoted, distinctly states this to be the fact. The most barefaced case of the kind that we recollect is that spoken of by Mr. Taylor, formerly a member of the Civil Service in Bengal, but now practising as a barrister before the Courts in India. That gentleman was conducting a case before the Mahomedan judge of Patna, Abdool Azeez. The officers of that Court actually asked for the usual fees of two rupees for each witness examined, and five rupees for the clerk of the Court. The alternative Mr. Taylor well knew to be the loss of his case, for, to quote from the *Friend of India* on the case, "the delicate process of 'spoiling the evidence' is easily accomplished when the judge is so lazy as to be either under the influence of his subordinates or unwilling to hear evidence in open court."

We might say a great deal more as to the working of the Subordinate Courts. The delay, for instance, in hearing

\* High Court Circular Orders, No. 17, of 1865.

† *Ib.*, No. 8, of 1863.

the paltriest case, and the enormous costs, might furnish texts for further disclosures of the system. It is to be hoped, however, that the evidence we have already given is conclusive as to the unfitness of these Courts for the work they have to do. We do not mean for a moment to say that this unfitness is entirely, or even mainly, owing to the fact that the whole administration of justice in these Courts of original jurisdiction is in the hands of natives. To place men in the position in which these judges and others are placed is most unfair to them. If the same thing were done in England, if men of little education, men who had been to school only to learn reading and writing, and had spent the remainder of their lives as clerks to the lowest class of attorneys, or as officers of a court where all officers are either not paid at all, or paid most inadequately—if, further, they had never seen or heard of a real trial, as a trial is understood in England, if such men were made judges of High Courts of Justice, with all the powers of a superior court of law, on a salary which was ludicrously small, we should be very much surprised if the result were not very much the same as that which we have shown to be the state of affairs in India. It is not with the natives of India that the responsibility rests, it is with the people of England, who have neglected their first duty of providing competent and trustworthy courts of justice for that great country which Providence has committed to their care. The English nation and the Government of India—a government that acted upon the maxim, and even now does act upon the maxim, that any man is fit to be a judge—are alone responsible, and it is on them that the awful burden of the wrongs innumerable, which these Courts have fostered instead of reducing, must be laid, and for which they will be sooner or later called to account. The principles and system on which the District Courts are constituted are just as unsound and quite as productive of harm as those of the Subordinate Courts. We shall discuss this subject in a subsequent article.

## Notices of New Books.

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[\*.\* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

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**Land Transfer Bill and other Law Bills in Parliament.** By Lord St. Leonards. London: John Murray. 1870.

LORD ST. LEONARDS' careful examination of this Bill should be read by every landowner and lawyer, that he may be warned in time against it. He contends that its effect will be to increase the burdens on land for the benefit of the Exchequer, and to increase the expenses of transfer—to endanger the rights of persons interested in land by giving extraordinary facilities to limited owners to obtain sales, and to throw the property into litigation—to deprive the real owner in some cases both of his land and the purchase money for it—that the Bill is an immature production, giving the Chancellor of the Exchequer too much power in regulating the rules, costs, and fees, and the investments of moneys of the suitors, with a view, not to the necessary provisions only for effectual registration, &c., for the benefit of the landowners, but to keep up and maintain an army of officials in district registries all over the kingdom, and replenish the Exchequer. The registry is to be compulsory, but the rules and orders and fees are not set out as they well might have been, and an extensive machinery is to be erected at a vast but undefined cost, which may ultimately fail of its end as the present registry has done. It would be impossible to enter here any further into the subject, but the learned author's remarks upon the Bill, as also upon the High Court of Justice Bill, the Appellate Jurisdiction Bill, and other Bills, the disposition of Chancery funds, and the funds of creditors in the Bankruptcy Court, we need not say are of the greatest value. The appendix contains the evidence under the Commission on the General Registry, and the author has included in the publication some remarks on the report of that Commission.

**Our Judicial System.** A Letter to the Lord High Chancellor on the Proposed Changes in the Judicature of the Country. By the Right Hon. Sir Alexander Cockburn, Lord Chief Justice of England. William Ridgway, Piccadilly. 1870.

Observations on the High Court of Justice Bill, Drawn up at the Request of the Jurisprudence Committee of the Law Amendment Society. By Edwin W. Field. 1870.

It is almost impossible to do more than to call attention to these two pamphlets, for at the present time it is not too much to say that the state of the law, internally and externally, is one of absolute chaos.

All that the Chief Justice says is entitled to weight; all that Mr. Field, one of our oldest and most consistent reformers says, is entitled to weight; but in the teeth of the letter of the Chief Justice, the two Bills have passed the "Lords," and the subject matter of Mr. Field's pamphlet, which relates to procedure, has yet to be considered. No doubt some of the legal positions of the Chief Justice have been severely and adversely criticised, but this, in fact, in no shape or way, influences the substantial question, namely, the desirability of change in our procedure.

Mr. Field's remarks are, as might be expected from a solicitor of his experience, full of practical suggestions. To be able to pronounce upon all of them would require as much knowledge on the subject as Mr. Field himself; but, without pretending to anything of the kind, it is impossible not to be struck with the comprehensiveness, and with the wide grasp the writer has of the question with which he is dealing.

Elementary Precedents in Conveyancing: a Collection of Practical Forms designed for Professional Use, and suited to the Emergencies of Actual Practice, with Notes and Table of Stamp Duties. By Thomas Wilkinson, Esq. London: Horace Cox. 1870.

It is clear that the above title has no reference to the contents of the work. Many of the Precedents are special, and required particular care in the framing, but of this, we are sorry to say, there appears little trace. Take, for instance, the form of will, No. 216, giving shares to testator's unborn grandchildren who shall attain the age of (——) years, and making such interests void on such grandchildren marrying "directly or indirectly into the blood of the family of G." This is a prohibition of marriage with any child of Adam, and is void; and the author seems to have no idea or remembrance of the rule against perpetuities, for he does not guard the reader against filling up the blank with some number not exceeding twenty-one, and the divesting clause has no limit of years short of the grandchild's life. Surely this Precedent is not elementary nor trustworthy. Then Precedents 218 and 220 are wills in which life interests are given to parents, with remainders to children attaining twenty-one, but the gift over is only in the event of the parents dying without issue, and thus there is an intestacy in the event of there being children who all die under twenty-one. This is not a form to follow. Precedent 18,

an agreement for the sale of a public-house lease, goodwill and fixtures, is not elementary, and it declares that vendor has a good right to assign unencumbered—and so he would be bound to show his lessor's title for sixty years, and give absolute covenants for title! So, under Precedent 16, an agreement for sale of a leasehold, held under a corporation, there is no restriction as to title or producing lessor's title! Precedent 14 is an agreement for letting a theatre for a term with the scenery and appurtenances, a surety guaranteeing rent, &c.—a very complicated arrangement. And in this and other agreements the author inserts a provision, on which he seems to place great reliance, to the effect that lessor may re-enter by force without process of law! The contracts for sale have a clause making the expenses “of and *incidental* to this contract,” to be borne equally by vendor and purchaser—vague terms which would certainly lead to dispute. At the end of a complicated agreement for sale of freeholds for building purposes, with a charge for unpaid purchase money, and further advances on the premises and materials brought on them, a clause is used for the purpose of shortening the document, which says that the personal representatives and assigns of the vendor shall be bound by, and entitled to the benefit of the contract, omitting his *heirs*, the most important persons, to be so mentioned. Precedent 201, a statutory declaration identifying a person named in a certificate is insufficient, as it only amounts to this, that C. D. mentioned in the certificate was the *said* C. D. so mentioned. But without entering further into particulars, we may say (after a careful perusal) that the work is a miscellany, not unlikely to be suggestive to any practitioner who thoroughly knows how to use Precedents without relying on them, but in face of the many good and careful volumes of Precedents already published, there seems to be little call for this collection, which, to say the least, is not very trustworthy, or fit for use on the Emergencies of Actual Practice.

**A Book of Chancery Costs ; comprising the Costs of Plaintiff and Defendant of Suit by Bill, on Special Motions, Special Petitions, and Special Cases, Appeals, including Appeals to the House of Lords, Appointment of a Receiver and passing his Account, Foreclosure Suit, the Trustee Relief Acts, the Companies Acts, with the Regulation as to the Mode of Remunerating Official Liquidators, the Charitable Trusts Acts, and Miscellaneous Matters. On the Lower and Higher Scales. With an APPENDIX containing all the Orders of the Court of Chancery, and of the County Courts under the County Courts Acts, 1865 and 1867, relating to Equitable matters, now in force, regulating Charges and Fees allowed and taken in the said respective Courts. By W. Shaen, M.A., and Eden Kaye Greville, Solicitors. Second Edition, carefully**



revised and considerably enlarged by J. J. Binning, Managing Chancery Clerk. London : Wildy & Sons. 1870.

THIS work, which contains a collection of precedents which the editor assures us have been framed in strict accordance with bills of costs which have passed the ordeal of the Taxing Office, checked as to each item by the charges and fees allowed and payable under the several orders, needs no recommendation to practical men. There are useful notes inserted showing how and when the items may be altered. The book does not claim, however, to lay down the general principles followed by the Court in allowing or regulating costs. They must be sought in other works. But when the Court has decided the general question as to costs, the solicitor will come here to see how to make up his bill of costs.

*Early Sketches of Eminent Persons.* By James Whiteside, now Lord Chief Justice of Ireland. Edited, with Notes, by William Dwyer Ferguson, LL.D. Dublin : Hodges, Foster, & Co. London : Longmans & Co. 1870.

WE have read with the greatest possible interest the early sketches of eminent persons by the Chief Justice of Ireland, which Dr. Ferguson has collected and edited. As specimens of the literary ability of the learned Chief Justice they are admirable. We are not, indeed, always disposed to agree in the estimate which he forms of the celebrated character whom he describes, but considering that the sketches are all the productions of a juvenile pen, it is only natural that this should be so. The subjects of the sketches are nearly all eminent members of the English or Irish Bar, and when we mention that the date at which most of them were written was forty years ago, it will be obvious that we cannot be surprised at a certain amount of juvenility and some leaning towards the more showy qualities of advocacy. This tendency is peculiarly marked in the first sketch, that of Sir James Scarlett. Sir James obviously did not come up to the young Irishman's ideal of a great counsel. He had not the eloquence and the fire which had been associated with leadership at the Bar, and was very unlike either Erskine or Curran. Mr. Serjeant Wilde also, although in a different way, fell short of the high ideal which had been formed by the youthful writer. It may be doubted whether the Chief Justice would now express similar opinions with respect to the forensic merits of those two eminent personages, and we are quite sure that his estimate would be much higher of the legal acquirements of both. Although all the sketches are exceedingly well done, we would particularly mention those of Sir Charles Wetherell and Sir James Mackintosh—the former as containing an admirable description of a now almost forgotten worthy; the latter as being a really philosophical review of the character of a man of great intellect and learning. One excellent quality of all the sketches arises from the complete abeyance of political feeling. Those who know

the great sympathy which their accomplished writer has always shown with intellectual power wherever exhibited, and the generous and kindly feelings which he has uniformly displayed towards opponents, will not be surprised at this. Dr. Ferguson's part of the work, we need scarcely add, has been well performed. In a note appended to each of the sketches he has given an account of the subsequent history of the various eminent persons, who were nearly all in their prime when portrayed by the graceful pen of Mr. Whiteside in these Early Sketches.

An Essay on the Science of Law and on its Reform. By W. Forbes Johnson, Q.C. Dublin : Hodges & Co. 1870.

THE author of this essay is a lawyer who exhibits more minute knowledge of, than placid contentment with, his own profession. In so far as he manifests a desire to see the whole structure of legal procedure and precept firmly established on a more philosophical, and therefore more assured basis, he assists in an enterprise which will in this generation rather deserve than command success. As he points out, the practice of law has, in all instances, excepting those of the very highest constructive minds, a tendency to unfit the successful and popular legal practitioner for the higher function. Laws are hastily and unscientifically made and altered; and every page of the Statute Book may be said to exhibit the traces of ill-considered empiricism. These and other considerations seem to show that Mr. Forbes Johnson is not far astray in demanding (without any personal interest involved) for the professors and teachers of the faculty of law, a higher position and a wider scope. In England, the busy practical lawyer becomes both the legislator and the expounder of the law, and there is not even the advantage (enjoyed in India) of the constant services and the superintending care of a jurist, or accomplished master of the theory of law. When the excellent scheme to which Sir R. Palmer has rendered the support of his great name and fame comes to maturity of fruition, we may however expect to find some of these glaring defects remedied. With a great university or faculty of law must be associated and developed a learned staff of really scientific lawyers, whose aid in the work of legislation will certainly be capable of becoming, if rightly used, of immense value. The divorce of Law from Equity is strongly censured by Mr. Johnson, who considers that for exactly one hundred years past (when *Perrin v. Blake* was decided) our laws have become year by year more confused. He holds that the rules now acted on by the Courts in the construction of testamentary documents are unsound, and calculated to work injustice; and he deems that a court ought to regard the intention of the testator, rather than the recognised legal effect or technical meaning of the particular words which he may happen to employ. We cannot, however, admit that any change could advantageously be made in this particular, and we consider that the existing rules which now lie like stratified rocks beneath the ever-disturbed tide-

way of litigation—a tideway under which the slow process of depositing and of hardening has been for generations continued—could not safely be disturbed. In some instances, apparent injustice may indeed be wrought, but a far greater public evil would be the attempt to substitute other principles of construction, accompanied as that attempt must be by a long intermediate period of chaotic uncertainty and hopeless confusion. Mr. Johnson, who was one of the counsel in the leading Irish case of *Errington v. Rorke*, questions the wisdom of the ultimate decision in that much contested suit. It established indefeasible title, as conferred by a Statutable or Parliamentary Conveyance, on an unassailable basis; and it has now become the foundation of many thousands of such titles to property in Ireland. It is surely more for the public benefit that this state of things should continue, than that *Rorke's* little leasehold interest (said to have been sacrificed by some error or oversight) should have been preserved to him in defiance of the plain language and undoubted policy of an Act of Parliament. In short, with all deference to our author, the House of Lords is generally, if not universally, considered to have rightly adjudged the case against Mr. Johnson's client. It seems that some such error as this occurs every four or five years, as a counterbalance to vast public benefits and conveniences; if so, the right remedy would in our opinion be to compensate from the public funds any person who can establish a genuine case of injury sustained. Mr. Johnson's greatest complaint is, however, directed against the power of the judges to interpret, or rather as he represents the matter, to *make* laws, a power exercised at a stage of their career when long practice has reduced them to a "melancholy state" (to use Mr. Johnson's expression), when the dictates of common sense are crushed by the overpowering burden of a technical legal system. In the last chapter of his entertaining pamphlet Mr. Johnson tells us that he estimates the number of persons of all ranks connected with the law (from the Chancellor down to the smallest office boy) at eighty thousand, and the aggregate of their earnings at twenty millions of pounds annually; and he intimates in very plain terms, an opinion that three-fourths of this is money thrown away, or worse. He concludes with a list of recommendations, some of which possess the merit of novelty, while others are already familiar to those who have read the reports and proceedings of the "Law Amendment," and of the other kindred societies. As regards the administration of justice, Mr. Johnson would have it localised as far as possible, the judge of appeal going circuit twice a year, with no appeal from him except to the House of Lords, and the business of that august tribunal should (he considers) be transacted by all the peers and not by a select number forming the little knot of Law Lords. Whether it would or would not tend to the scientific arrangement and development of law that all the peers, including the Marquesses of Townshend and Dukes of Newcastle, should deliver their judgments after hearing appeals to the highest tribunal, each reader will determine for himself. Whatever conclusion may be come to on this, or on any other of the numerous



suggestions contained in Mr. Johnson's little book or large pamphlet, we can confidently recommend it as the vigorously written production of an original mind, and as likely to prove to any legal traveller by railway or coach, on circuit or in vacation, more instructive, if somewhat less amusing, than the far-famed "Lothair."

**Land Systems and Industrial Economy of Ireland, England, and Continental Countries.** By T. E. Cliffe Leslie, LL.B. London: Longmans & Co. 1870.

WHEN a learned lawyer and accomplished political economist undertakes to inform the world on a topic with which he has had special facilities of becoming acquainted, the result ought to possess a distinct and permanent value. Professor Leslie has collected, and published in a goodly volume, a number of essays on the varying aspects of the land question, originally contributed by him to reviews and magazines of high repute. His claims to be attentively heard on the question are undoubted, for he has lived many years in Ireland, and many in England—years of thought and study; and moreover he has, in the capacity of observant critic, paid several visits to certain little known but highly interesting districts of Prussia and of France.

The earlier portion of the volume deals with that Irish land question, of which the solution has been so gravely and vigorously taken in hand by Mr. Gladstone: and although most of the pages were written long before the slightest intimation was given as to the probable shape and tendency of the Government Land Bill, it is quite evident that the policy of that most important measure is exactly such as would commend itself to Professor Leslie's mind. He is quite alive to the fact that "insecurity of tenure" is one of the main grievances of the rustic Irishman, and is precisely the evil which Parliament can fairly and rightly attempt to redress. That it is the only source of mischief no well-informed man would venture to state; for there are many minor ones which are and must for ever remain beyond the reach of the legislator. Political economists in Ireland are in the habit of saying, and of impressing statesmen with the belief, that emigration is an advantage, in diminishing the competition for land and in raising the rate of wages. Professor Leslie is partly of this opinion, for he would prefer a change in the manner of conducting agricultural operations, of such a kind as that vastly more hands instead of fewer would be employed. The tendency in Ireland is for tillage to be abandoned, and for the land to be turned into pasturage for cattle. This change is going on in nearly all the rural districts: and one consequence of it is that there is a steady diminution amongst the inhabitants of the cottages and cabins.

Professor Leslie is one of those who approve of *la petite culture*, and who lament the absorption of small farms. If the Irish small farmer could be persuaded to exercise thrift and industry, and throw his energy into the application of the spade, with such aid as modern chemical science may afford, he might indeed become as prosperous

and as contented as the Roman Catholic peasant of Belgium or of Switzerland. But, unhappily the Irish peasant will only work as his fathers have done before him. He is unwilling to vary the accustomed monotony of his bucolic life. None can persuade him that cattle should be kept under cover, or that turnip-growing is highly remunerative, or that free use of artificial manure will double his resources. If advice of this kind be ever given, it is suspiciously received, and probably at once forgotten. It now remains to be proved whether the knowledge that he cannot be evicted from his farm will transform the small farmer into a wiser and a better man. In short, if the social habits and mental condition of the rural population were quite different, we should thoroughly agree with Professor Leslie in his preference for a little homestead and surrounding plot, cultivated by one family in the expectation of a yearly increase of wealth, and with no remote prospect of a larger farm, of higher education, of increased comfort, perchance of an unencumbered ownership in fee simple.

Turning to Professor Leslie's chapters on English rural economy, we find him arrayed with those who deprecate a system which, year by year, finds the ownership of the soil in fewer hands. There are in round numbers 60,000 square miles of English land, and all this is the exclusive property of only 30,000 men, whose number is steadily though slowly diminishing. The late Mr. Cobden lamented this extinction of the yeoman class, once famous in English annals—the class which has produced few more illustrious men than himself. Thorold Rogers now keeps alive the complaint, keenly present to his mind through his knowledge of the county (Sussex), where the diminution of the number of proprietors is most rapidly proceeding. Professor Leslie regards it as no mere sentimental grievance that the small landowners should become fewer and fewer; for this is connected, in his mind, with the monstrous and unhealthy outgrowth of the metropolis and of the larger towns, and with the degraded and pauperised condition of the agricultural poor. This state of things will tend, in his opinion, more than we are ready to admit or believe, towards revolution in the future. For it is not difficult to imagine that a day may come when all the land shall belong to the millionaires, and when those who work upon it shall be disposed bitterly to resent the condition into which a long train of circumstances shall have plunged them. To facilitate the sub-division and transfer of land would therefore be a conservative proceeding. Let the present generation of lawyers be happy while they may, for the time must come when artificial obstacles, by which they are supposed to thrive, must be swept away ruthlessly.

Professor Leslie gives a graphic sketch of the teeming industries of the *Ruhr* District in Westphalia. Visitors to the great French *Exposition* of 1867 will have observed some titanic blocks of murderous artillery bearing the name of "Krupp"—then peacefully labelled and freely exhibited to the gaze of Frenchmen as well as of travellers—now, it may be preparing to deal out death and destruction to the army of Paris. This wonderful manufacture, and many



others, are described as the results of a rare combination of human faculties, and geological, or rather mineral, conditions, in a district which improves so rapidly, as in a single year to change its aspect to him who revisits it. Rapidly rushes on the current of events; for only two years since Professor Leslie wrote that the "war cloud had dispersed," little imagining that it was so shortly to gather and blacken towards the out-flame of war, over all the land between Westphalia and Paris!

Of Professor Leslie's criticisms on certain French phenomena, observable in *La Creuse* and elsewhere, there is not time to speak. Nor can we do more than note the very clear and discriminating way in which he has described the land systems prevailing in the different parts of Belgium. In a future edition of his volume, it might be worth while to describe with some minuteness, the legal machinery by which proprietorships of land, in countries where it is much sub-divided, are controlled. In Great Britain there is little inducement to become a small purchaser of land, for the expenses of title and conveyancing are out of all proportion. Professor Leslie might with advantage proceed to explain how it is that Belgian vendors and purchasers, heirs and legatees, can conduct the transactions arising out of land, without being swamped by the expenses incidental to sales and transmissions of interest. And with this suggestion we close a book full of genuine information and intelligent discussion, which may fairly be commended to the careful notice of any one who wishes to be thoroughly made-up on the home and foreign aspects of the great land question.

**The New Law and Practice of Bankruptcy; comprising the Bankruptcy Act, the Debtors' Act, and the Bankruptcy Repeal and Insolvent Court Act of 1869, and the Rules and Forms made under those Acts, with a Comparative Summary of the Cases decided under the former Laws. By Roland V. Williams, and Walter V. Williams, Esqs., Barristers-at-Law. London: Stevens & Sons, and H. Sweet. 1870.**

This book comes before us with every claim for kindly criticism. The authors are the sons of Sir Edward Vaughan Williams, to whom the work is dedicated, and they bear the name of one whom the whole profession respects. Thus, if the work had not merits of its own to recommend it, we should strive to be somewhat blind to its faults. But our authors have no need to ask for any indulgence, as their book will, beyond question, bear comparison with any published upon the present Acts.

There is evidence of great labour in the work, and the laws have been collected with great industry; and, without going into detail, we can safely say that upon the whole we think our authors have compiled a book of very great merit, and one that ought to be, and we trust will be, most acceptable to the profession.

**Supplement to a Manual of the Law and Practice of Bankruptcy, as Amended and Consolidated by the Statutes of 1869. With an Appendix containing the Statutes, Orders, and Forms, up to the 30th April, 1870. By John F. Bulley, and T. W. W. Bond, Esqs., Barristers-at-Law. London: Butterworths, 7, Fleet Street, 1870.**

We have, in a past number of our journal, called attention, at some length, to this work.

Our authors have now rendered their work complete by the present Supplement. Since the publication of the book two important sets of Orders have been issued—one a general Order of the Court of Chancery under the Debtors Act, 1869; the other, the general rules made under the Bankruptcy Repeal and Insolvent Court Act, 1869. As the work now stands it has our hearty approval, and among the many admirable works of which the Bankruptcy Act is the parent, we know of none more excellent.

**An Analysis of the Principal Steps in a Bankruptcy Proceeding taken from the Bankruptcy Act and Rules, with an Index to the Bankruptcy Act, 1869, the Debtors Act, 1869, the Bankruptcy Repeal and Insolvent Court Act, 1869, and the Various Rules made under those Acts; to which is added an Alphabetical List of the Forms published with the Rules. By Frank R. Parkes. London: Stevens & Sons, 119, Chancery Lane. 1870.**

If there is one feature more wonderful than another in the character of the legal profession, it is its industry. It has been our duty, as the guardians of the public time and money, to see that neither were wasted on worthless publications; and we have, in the discharge of that duty, examined a host of publications which owe their life to the New Bankruptcy Act, and the other Acts *in part materia*.

Mr. Parkes has done good service, for this analysis, in its nature somewhat more exhaustive than Mr. Linklater's Index, is nevertheless of somewhat like character, and will be found exceedingly useful. We have tested it, and can say that while it makes no pretension whatever, it will be found more useful to the practitioner than many of the manuals of which the present time has been prolific, and we heartily commend it to the notice of the public.

**The Law of Joint Stock Companies and other Associations, as contained in the Statutes relating to Joint Stock Companies, the General Orders and Rules of the Court of Chancery, and Decisions of the Courts of Law and Equity, together with the Industrial and Provident Societies Acts and County Courts Orders thereon, the**

Stannaries Act and Rules, and the Acts relating to the Abandonment of Railways and Winding up of Railway Companies ; with Notes as to the mode of procedure under them. By Edward W. Cox, Serjeant-at-Law, Recorder of Portsmouth. Seventh Edition. By Charles J. O'Malley, LL.B., of the Middle Temple, Barrister-at-Law. London : Horace Cox. 1870.

So long as Parliament refuses to be relieved of a duty, which it is of all conceivable legislators least competent to fulfil, prevents that, namely, of a final and careful revision of the Statutes passed by it, the form of this volume must perforce be adopted by every writer on those branches of law which rest chiefly on Acts of Parliament judicially interpreted.

The work before us consists mainly of the several Acts and Orders enumerated on its title page, with annotations giving the decided cases on each section. The whole of this part of the work is due to Mr. O'Malley. Prefixed to it is a compendious treatise on the law and practice of Joint Stock Companies, including their winding up, which, with the exception of the section on winding up, has been done by Serjeant Cox.

Of this introductory treatise a large part consists under the guise of hints for the formation and practical working of a Joint Stock Company of an attack in the learned author's well-known vigorous style, upon the whole principle of limited liability. In the case of a book which is intended for practical use, we are bound to say that we feel serious doubts of the expediency of language such as this :—

“ Limited liability . . . is designed to enable a man to avail himself of the acts of his agent if advantageous to him, and to avoid responsibility for them if they should be disadvantageous ; to speculate for profit without being liable for losses ; to make contracts, incur debts, and commit wrongs ; the law depriving the contractor, the creditor, and the injured, of his rightful remedy against the property or the person of the wrongdoer, beyond the limits, however small, at which it may please him to determine his own liability. Thus it practically enables a trader to speculate for the chances of indefinite gain, without being liable for more than a definite loss.”

“ The practical effect, and probably the design, of this provision, is to enable wealthy persons to speculate in trade, pocketing the profits if the business succeeds, and avoiding the losses if it fails. It is an ingenious contrivance for the further encouragement of roguery, by indefinite extension of the too large protection it enjoys already.”

“ The professed principle of the present law is absolute liberty for speculators, debtors, and swindlers.”

Unquestionably there is an absence here of that *lumen siccum* by the aid of which a lawyer ought to contemplate his work. It may indeed be said that there are occasions when even a jurist does well to be angry. “ *Fearne on Remainders*,” and “ *Wigram on Discovery* ”

owed their origin to the dissatisfaction felt by their authors at interpretations which they considered erroneous of the law. But it is one thing to make a doubtful judgment the foundation for an independent work, and another to make a professedly practical treatise the vehicle for invective unsupported by argument.

The principle of limited liability, as it is called, is now so thoroughly implanted in our legislation, that a defence of it might seem superfluous at this time of day. But, as we have lately seen in the case of protection, old errors, which every one thought had been generations ago dead and decently buried, have sometimes an awkward power of resurrection, and it is but charitable and decorous that those who have the opportunity should do what is in them to dismiss once more such ghostly wanderers to their rest.

Serjeant Cox's quarrel with limited liability appears to be two-fold. (1st.) That it enables rogues to avoid fulfilling their engagements. (2nd.) That it encourages rash speculation.

The first objection might be of some force if every one contracting with a Joint Stock Company were induced to do so on representation that the liability of its members was unlimited, and was only awakened from that golden dream when the time for performance by the company of their part of the contract arrived. But what is the fact? The most scrupulous care has been taken by the framers of the Act that every one dealing with a limited company may learn the amount of its capital subscribed, paid-up, and unpaid, and of every particular relating to its shareholders which can be required to enable an estimate to be formed of their ability to pay whatever may be due from them. In truth those who deal with a company have far fuller means of ascertaining its position than the customers of a private firm, which may, and generally does, shroud the whole of its dealings in a secrecy utterly unattainable by a company. To say that a man who under these circumstances makes a bad bargain with a company has anything but his own folly to complain of, is surely opposed to the most elementary principles of justice and law.

The true answer to the charge of promoting speculation, is that grown up persons must be the best judges of what is for their own interest. No legislation will prevent a gambler from imperilling his wealth on what to prudent men might seem a hopeless risk, but surely that which interposes to diminish the danger of hopeless loss is not open to the charge of encouraging either the gambling spirit or its worst effects; while to forbid any one, *sui juris*, from entering into what contracts he pleases, because there are many men who make foolish bargains is at least as illogical as it would be impracticable.

That there has been much wild speculation and consequently much loss and suffering within the last six or eight years is not denied. But limited liability has been its instrument only and not its cause. Its origin must, like that of the Mississippi Scheme, the South Sea Bubble, and the Railway Mania, be sought for in that credulity which legislation and experience seem hitherto to have been alike powerless to restrain.

Apart from these questions there is much that is in the introduction



calling for our cordial commendation. Under the head "Proceedings of the Board of Directors," pp. lx, *seq.*, will be found an admirable practical guide, clearly and vigorously written, to the transaction of the business of a board. We are glad to see that the author takes occasion to state the true principle of the usual form of confirming, or, as he prefers to call it, affirming, the minutes of the previous meeting. We thoroughly sympathise with him in his comments on the expensiveness of the remedy by winding up an insolvent company (p. lxxvi), but we would remind him that the cases in which an unsuccessful company, with all its capital paid-up, can find creditors, are not likely to be numerous.

Turning to Mr. O'Malley's portion of the volume, our task is easy. The notes on the different sections of the Acts and Orders are full and carefully written, and, so far as we can judge, may be relied on, as showing the present state of the law. The cases are fully noted up, and are by the addenda brought down to the early part of the present year. The index is full, and its value is much enhanced by numerous cross references. We would advise the editors when their next edition appears, to add to the running titles at the heads of pages the number of the clause, as well as the name of the Act or Order, and special subject treated of, and we would point out that in the form of share certificate at p. lxv of the introduction, the word limited should be inserted after the title of the company, with a note directing its omission in the case of an unlimited company. A note should be added at p. li, pointing out that under the Regulation of Railways Act, 1868, all incorporated railway companies must make out their accounts in the forms given in the schedule to that Act.

**The Law Relating to Boundaries and Fences ; and to the Rights of Property on the Sea Shore and on the Beds of Public Rivers and other Waters** By Arthur Joseph Hunt. Second Edition. London : Butterworths. 1870.

THERE are few more fertile sources of litigation than those dealt with in Mr. Hunt's valuable book. All the anathemas pronounced on those who remove their neighbour's landmarks have not sufficed to prevent unscrupulous men from encroaching on their neighbour's territory, or from at least attempting to convert a possible or hoped for right into a certain one. But apart from actual malice, disputes in reference to boundaries are always arising from rights overlooked, from neglected fences, from boundaries varied by accident, from shifting river or sea banks, and from under-flowing water. But that the majority of people are tolerably good-natured our litigation on these questions would be tenfold what it is. Fortunately, our laws of prescription are continually creating rights, or at least limiting the times within which actions may be brought, and are thus every day counteracting the carelessness of property holders. The presumptions too which the courts set up work in the same direction. The presumption, for example, in default of evidence, that where



two estates are separated by a hedge and a single ditch, both hedge and ditch belong to the owner of the land on which the hedge is planted is perfectly well understood, and no doubt prevents much litigation. As a rule of law, it is clear and satisfactory, although, in spite of the very ingenious theory by which it was supported in *Vowles v. Miller*, it may be doubted whether in the majority of cases it is likely to be in accordance with the facts. We have no intention, however, of going into the great body of matter presented by the volume before us. It is sufficient here to say that the volume ought to have a larger circulation than ordinarily belongs to law books, that it ought to be found in every country gentleman's library, that the cases are brought down to the latest date, and that it is carefully prepared, clearly written, and well edited.

On the Laws and Customs relating to Marriage, being a Paper read before the Dialectical Society. By Richard Havte. London: Truelove, 256, High Holborn 1870.

THE present writer professes himself tolerably "advanced," and has no objection that the subject of marriage or any other should be discussed in the fullest manner possible. But he would not be prepared to advocate Mr. Havte's views yet. "Marriage by election" may be the last of a series of steps in the emancipation of woman, and in the elevation of the sexual relation, but we are certainly not prepared to advocate it. Prostitution is no doubt horrible, and infanticide worse still, but it is not proved that "marriage by election" will remove either the one or the other, while it would certainly bring new evils in its train. The author proposes under this ambiguous term that marriage shall continue just so long as the parties, or either of them, wish it to continue. Love, or rather passion, to call things by their right names, is to be the rule of society, and marriage to be co-extensive with it.

On the Law of Forfeiture for Treason and Felony. By Philip Vernon Smith, Esq. London: Wilde & Sons. 1870.

THIS is a carefully prepared paper read before the Juridical Society. Mr. Smith proposes to make the operation of forfeiture upon real and personal property in all cases identical; to abolish all claim on the part of the lord of the manor as such to the lands of a felon; to render the funds of property liable to be recovered by the State if fraudulently alienated by the offender with a view to defeat the forfeiture; to obliterate, for the purposes of forfeiture, all distinction between felonies and misdemeanours. The paper will repay reading.

De la Peine de Mort. Par Edouard Desprez. Paris: A. Durand et Pedone-Laurel. 1870.

THIS is an attempt to demonstrate the desirability of the abolition of capital punishment. One of the arguments on which the writer

insists is, though not new, one which has had less attention called to it than others with less weight. It is that the punishment knows no degrees. It has neither maximum nor minimum. All shades of culpability are confounded. The old law of every country in Europe tried to meet these evils by devising all sorts of horrors and proportioning them to the crime. Our own penalty in case of treason was ingeniously horrible, but it was mere 'prentice work in comparison with some of the continental punishments. The author rightly insists that it is not the lightness of the penalty inflicted, but the impunity which encourages crime.

**Recent Legislation on Contagious Diseases Considered.** By Francis Close, D.D., Dean of Carlisle. London: Tweedie & Co. 1870.

WE are inclined to differ from the conclusions of Dean Close. Such being the case, necessarily we are not in the frame of mind to appreciate writing of this kind. A man must have worked himself up to fever heat before he can relish such a shriek as this pamphlet is. The subject is one which requires calm judgment; Dean Close uses only heated declamation. Much is to be said on both sides. The Dean is too heated to use any argument on either side. This kind of writing it is which does harm to the cause it professes to support. We regret extremely to have to class with it a pamphlet by Mr. F. W. Newman. The latter is of course a very much better specimen of English and of argument than that by Dean Close, but, out of respect to a vigorous thinker, we regret to have to say that in violence and in unreason the two pamphlets must be placed together.

**The Albany Law Journal: A Weekly Record of the Law and the Lawyers.** Albany: Parsons & Co. 1870.

THIS journal continues to be as well edited and as interesting as ever. One of the subjects treated of is the comparative salaries given to judges here and in America. Congress, it appears, has declined to increase the pay of the judges of the Supreme Court from 6000 dollars to 10,000 dollars a year. At this the American Bar have surely a right to grumble. It may well be doubted whether some of our judges are not underpaid, though most of them receive almost as many pounds as their American brethren do dollars. It is certain that there are men at the Bar to whom it would be a serious pecuniary loss to be promoted to the Bench. Something, of course, is to be put down for the honour and dignity of the position, and for the security of tenure, but when all this is said, it is surely unwise in a great country like America to pay her judges salaries so small as barely to put a man out of the reach of temptation to sell justice; or to allow it to be evident to all that a man had better turn store-keeper or gold-digger than lawyer. The Journal is just a little unfair to the Prince of Wales. Hard hitting is unobjectionable, but it should not be below the belt.

**The Church Key, Belfrey Key, and Organ Key, with Legal Cases and Opinions, Parish Lay Councils, and the Autocracy of the Clergy.** By the Rev. W. H. Pinnock, LL.D. Cambridge: J. Hall & Sons. 1870.

DR. PINNOCK has taken for his principal subject the right of possession and use of the three keys belonging to the management of the lay duties in connection with the church building. There is no doubt that a deal of misunderstanding exists in the minds of churchwardens, curates, and others in rural districts having parochial business to perform, as to the proper custody of these instruments. A summary of the law and usage determining the powers and the privileges of the clergy and of the laity respectively, will be interesting to read, as a sort of historical account of a question which, in fact, has long since been set at rest. In working out the point, much information is given as to all that concerns the building and its interior arrangements, and what appertains to the office of churchwardens, and other parochial officials, or, as our author would have it, "lay interference." Under the first three heads is discussed all that relates to the law and custom affecting the control of the church, the bells, and the organ, and much labour has been bestowed in working up the authorities—in each case resulting in the established rule of law, that the minister has the absolute right to the custody of the keys of each.

The second portion of the work is of a less temporal description, and scarcely comes within the province of this journal to criticise. It may be an open question whether parish councils and committees, and the autocracy of the clergy, are conducive to the interests of the Church generally, and the admission of the laity in Church government is more a subject for the clergy to discuss than us, inasmuch as there is no law to prevent them uniting. The class of readers who would benefit by a perusal of this work are the clergy and churchwardens, and to them it would be invaluable.

**Difference of Sex, as a topic of Jurisprudence and Legislation.** By Professor Sheldon Amos, M.A. London: Longmans, Green, & Co. 1870.

THIS is the work of a thoughtful writer. His central idea is that it is necessary in legislation to recognise difference of sex. In this he differs, of course, widely from the school of writers and politicians who wish, not merely to introduce equal laws for both sexes, but to confound all differences between the sexes when before the law. Mr. Amos recognises in our higher civilisation a tendency to attach even more importance than heretofore to woman's place in the domestic circle. At the same time no writer can be more ready to admit that woman has claims which it will be to the interest of the community to recognise. We have great pleasure in commending Mr. Amos's work to the attention of our readers.

**The Medical Practitioners' Legal Guide; or, the Laws Relating to the Medical Profession.** By Hugh Weightman, Esq., M.A. Cantab, Barrister-at-Law of the Inner Temple. London: Henry Renshaw, 356, Strand.

THIS treatise is intended to furnish to the medical practitioner, as well as to the lawyer, that legal information which the continued changes effected by recent legislation have rendered necessary. We had intended to review this work at some length in the present number, but unfortunately we are obliged for want of space to postpone doing so till the next issue.

**A Code of English Law (Principles and Practice) for Handy Reference in a Solicitor's Office.** By Frederick Richard Syms. London: Stevens & Sons. 1870.

WE have already noticed the appearance of the first two parts of this work. In our May number we pointed out its leading characteristics. We can only say now that the remaining two parts, which treat respectively of Chancery and Bankruptcy Law, and of Common Law and Crimes, are compiled in the same careful manner as Parts I. and II. The author has added an extremely useful table of Statutes.

We have received a communication from the Rev. C. D. Field, the author of the book relating to Protestant Curates noticed in our last number. Mr. Field says:—

“You will not, I think, seriously maintain that it is a fair mode of reviewing a work on ‘the Law Relating to Protestant Curates and the Residence of Incumbents on their Benefices,’ to single out the word ‘*Curates*’ because it appears from the dedication that the author’s father is a curate, and proceed to expatiate upon the condition of curates as a class, comparing them with ‘skilled mechanics and head servants.’ Had any one ventured to interlard a criticism of any of Lord Eldon’s performances with sneers at ‘coal-fitters’ and ‘beer-retailers,’ I doubt not but that the ignoble critic would have been received with one universal shout of reprobation. In comparison with Lord Eldon, I am, if you will, a very Lazarus compared with a Dives; but the same spirit and the same principle, which in this land mete out equal justice to the poor man and the rich man, entitle him, whose path lies in the humblest walks of the profession, to the same fair play, which dare not but be accorded to those who have gained its most splendid heights. That the *Law Review* has violated this spirit and this principle on the present occasion will, I am satisfied, be the unanimous opinion of those who may take sufficient interest in the matter to form an opinion thereupon. A consideration of the merits of a work professing to be an exposition of the law relating to a class is, or ought to be, distinct from any contemptuous notice of the class itself; and sneers at the

‘pitiable condition’ of the members of the class and the counterpoise ‘which, doubtless, they have in the reflection that they are serving a heavenly master, and that the sacrifice they make is not for this world,’ while being indecorous in themselves and foreign from sober criticism, are utterly irrelevant to the sole issue between the author of a law treatise and his reviewer, viz., ‘whether or not the treatise contains a correct and sufficient exposition of the law, which is the subject thereof.’

“The reviewer animadverts on my use of the word ‘Protestant’ associated with ‘curates’ in the title, evidently not aware that the coadjutor of the Roman Catholic parish priest is, in Ireland and elsewhere, not uncommonly termed a ‘curate.’ The word ‘curate’ would not therefore *per se*, as he supposes, distinguish the lower grades of the clergy of the Church of England from the *curés* of the Romish Church. Moreover, there are in Ireland no ‘*curés*,’ though he will find the parish priest and his curate mentioned in ‘Carleton’s Traits and Stories of the Irish Peasantry,’ if he really considers tales of fiction of authority on such a point.

“He notices my non-use of the word ‘Protestant’ in the dedication. Can it have escaped him that the context supplies its place, and that its insertion would imply that there were other curates as well as Protestant curates in the Irish Church?

“I have vindicated my use of this word in the title and my non-use of it in the dedication, but the reviewer cannot seriously mean that the merits of the work depend upon the title and dedication, or upon the result of such mere verbal criticisms, in which, were I to indulge, I might expatiate on the phrase ‘curates and others, lay as well as clerical’ (in his second line), as implying that there are lay curates. If such there be, the fact is not generally known.

“To take a single instance—any one reading the reviewer’s remarks on my treatment of the question, ‘whether or not a curate’s office is *ipso facto* determined by the avoidance of the benefice,’ would be led to suppose that I had omitted to notice, first, that the bishop can remove the curate; and second, that the Church Discipline Act provides for the removal of the curate on due notice by a new incumbent—both which points are dealt with elsewhere in the volume.

“It may have escaped him that the Church Discipline Act (1 & 2 Vict. c. 106) does not apply to Ireland, while the Statute which does so apply (5 Geo. IV. c. 91) contains no provision whatever on this question, which is therefore *not* disposed of by the Church Discipline Act, as far as Ireland is concerned.”

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When the author of a law book deviates from the subject matter of his work, whether in the body of it, or in the preface, or in the dedication, or even in the title page, he must not be surprised if the reviewer, whose notice he has sought, should also exceed his strict sphere of comment.

The word “curate,” in the title page, “was not singled out be-



cause the author's father was a curate," neither was it done to disparage that class, but it was done because it was conceived that, taken in conjunction with its prefix "Protestant," and the assertion in the dedication, "that the Irish Church had been most justly dis-established," there was a desire to lower the curates of the National Church, and to exult at its downfall in Ireland. Contradiction to this surmise is challenged, but there is no reply. A curate of thirteen years' standing, a friend of the reviewer's, to whom the book was lent, returned it with the remark, "The title is unhappy, the word Protestant suggesting controversy," and this without any remark of the reviewer, and before a syllable of the review was written.

As to the complaint, "that the question whether or not a curate's office is *ipso facto* determined by the avoidance of the benefice," is not fairly dealt with, the work itself must be my justification. At p. 34 we read, "this question has never, that I am aware of, been judicially decided either in England or Ireland," and four pages follow, giving reasons, *pro* and *con*, and citing cases and opinions, the result of which inclines to the conclusion that the "curate's office is not determined by the avoidance of the benefice."

That I am not singular in the view I take of our author's dealing with this question, I must again quote the language of my clerical friend. His words are, "Mr. Field objects to Archdeacon Stopford's (p. 58) opinion, that on the vacancy of a benefice the curate is out. He says there is no authority for it, but out we go if we get due notice." It is due, however, in justice to assert that later in the book, in a note at p. 120, we find it stated, "If, then, the curate cannot quit without giving notice to a new incumbent, equality mutuality is equity, and it cannot be supposed that the new incumbent can turn him off without giving him notice."

The English Statute, s. 95, expressly provides for such notice, and then in the text we have the section of the 1 & 2 Vict. c. 106, set forth, not however following in its numerical order, as the other sections do. Why did the author, with the knowledge of the existence of the provisions of this section, lead the reader to imagine, as I conceive he does, at p. 34, *et seq.*, that the curate was not in England bound to quit his curacy on the death of his incumbent. This is all the explanation which appears to me to be required by reason of Mr. Field's communication.

"THE REVIEWER of the  
"Law Relating to Protestant Curates."

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## Events of the Quarter, &c.

### CONSOLIDATED GENERAL ORDERS IN CHANCERY.

It appears that the High Court of Justice and Appellate Jurisdiction Bills are not to be further proceeded with during the present Session, and it being highly improbable (having regard to the present and prospective state of political affairs), that the intimated re-introduction of those measures next session will be realized, it may be useful to recall attention to the subject of the General Orders in Chancery.

It is well known that a new edition of Consolidated General Orders in Chancery has for some time past been in course of preparation, but the work has not been completed, chiefly, it would seem, in consequence of the pendency in Parliament of the measures above referred to. Present circumstances, however, seem to suggest that the Lord Chancellor might now determine to give such new edition to the profession. For not only is it very uncertain whether the High Court of Justice Bill will be reintroduced next Session, but even if reintroduced and passed, the new system contemplated could not be brought into operation for a considerable time, probably two or three years. Other circumstances, too, combine to favour the suggestion. It is known that the proposed new edition is already in print, and only awaits a few additions and revision. So that much of the labour and expense connected with the work has been actually incurred, and the publication of it would no doubt reimburse the expense to the Fee Fund, as well as benefit the profession.

The subject is one in which this journal, in common with other legal journals, has taken considerable interest—and the following statements and extracts may be useful as evidencing that interest, and as furnishing additional information in reference to the subject.

The proposal that there should be a new issue of Consolidated General Orders in Chancery is based chiefly upon a consideration of the desirability and importance of there being at hand, available to the practitioner in the hurry and pressure of business, such an arrangement of the General Orders of the Court as shall afford greatly increased facilities of reference.

It has been very generally felt, that further analysis of the constituent rules of the several orders comprised in the Consolidated Issue of 1860, is necessary to a more methodical and strictly logical order of arrangement, and that a fuller and better arranged index is also required; all which requirements, with others, have become more imperative by the issue since 1860, of nearly thirty separate sets of General Orders.

In view of this object, an arrangement was prepared by Mr. Braithwaite, of the Record and Writ Office—(who, for many years past, has taken much interest in the practice of the Court, and supplied many facilities to the profession)—and, in 1867, he submitted such arrangement to the then Lord Chancellor (Lord Chelmsford), who, after investigation, was pleased to adopt it, and made it the groundwork of a new edition.

It will be remembered that the consolidated arrangement, issued in 1860, was originally taken in hand under the instructions and auspices of Lord Chelmsford (then also Lord Chancellor) though completed during the Chancellorship of the late Lord Campbell—and it is due to Lord Chelmsford, under whose instructions the edition now in hand has been prepared, to acknowledge his Lordship's further effort in the same direction on behalf of the profession. As before intimated, his Lordship accepted Mr. Braithwaite's proposed new arrangement in 1867, and in May, 1869, printed proofs (of an edition in close agreement with that arrangement) were specially distributed for revision. His Lordship's action in the matter, therefore, was very prompt, and it is to be regretted that circumstances have intervened to hinder earlier effect to his intention.

The following extracts, furnishing testimony favourable to the issuing of a new and improved edition, and showing how acceptable it would be, probably influenced his Lordship in the matter in no small degree.

In a former number of this journal (May, 1860, p. 41), noticing the consolidated issue of 1860, and alluding to the desirability of preserving a complete Code of Chancery Orders, we say:—

“It is to be regretted that the scheme of the Consolidation did not include some provision for giving permanent completeness to the Code. The attention of the Consolidators was called to this subject, but they did not feel justified in going so far beyond their instructions as to notice the suggestion in their report. Whether the advisability of some measure of this kind was overlooked by Lord Chelmsford and his successor, or whether it was thought that the practical difficulties of carrying it out were insuperable, we are unable to say, but there can be no doubt that, although the difficulties are considerable, they might be surmounted, if the attempt were heartily made. A plan for the purpose has been devised by Mr. T. W. Braithwaite, the author of the well known work on the practice of the Record and Writ Clerks' Office, with which his long experience has made him thoroughly familiar. Mr. Braithwaite proposes that the General Orders should be re-issued in a codified form at intervals of two or three years, that General Orders and Regulations, issued during the intervals of publication, should be revised with the Code by some proper person to be appointed by the Lord Chancellor—that obsolete matter should be expunged; and the new provisions inserted in the right place—that a copy of the Code thus altered should be submitted to the Lord Chancellor and the other Equity judges, together with notes of any decisions which may appear to have an important bearing on the General Orders—that

the judges should then consider, and, if they saw fit, approve of the alterations, and that a new issue of the Code, to be printed from the copy so approved of, should then be made.

“An obvious advantage of this plan is, that the new matter not yet incorporated in the Code would at no time be of great amount, while the principal, indeed we may say the only, objection that can be urged against it is on the ground of expense. . . . But whether these periodical re-issues would be entirely self-paying or not, the charges that would fall upon the Fee Fund could not possibly be very heavy; and the advantages of Mr. Braithwaite's plan in other respects are so great that we hesitate not to say it ought to be adopted.”

The *Solicitors' Journal* (May 5, 1860, p. 521), alluding to the principle of total repeal and abrogation, in connection with any re-issue of Consolidated General Orders, says:—

“This principle of total repeal and abrogation has also been advocated in a paper of suggestions for a codified arrangement of the General Orders which was forwarded to us, immediately after the issue of the Consolidated General Orders, by Mr. T. W. Braithwaite, of the Record and Writ Clerks' Office. So favourable is this gentleman to the principle of abrogation and re-enactment that his general scheme contains a proposal for the periodical republication and re-issue of the General Orders and Regulations in accordance with this method, even at comparatively short intervals of time, as a means of obtaining more thorough and permanent completeness. Without hazarding, however, any opinion upon this latter portion of his scheme, it must be admitted that the judgment at which he has arrived, with regard to the expediency of total abrogation and re-enactment, is entitled to respect.”

Again, reverting to the subject in 1864 (August, 1864, p. 361), we say:—

“In a former number of this magazine we alluded to the uncertainty which existed on the part, not only of counsel, but of the judges and officers, as to the Rules and Orders of the Court of Chancery before the issue of the Consolidated General Orders. We also foretold how the probable issue of new General Orders from time to time would again confuse and complicate the question, and we called attention to the plan of Mr. Braithwaite for giving permanent completeness to the Code. Mr. Braithwaite has now produced a work, which so far as the ‘times’ of Chancery proceedings are concerned, carries out his scheme. . . . We can only regret that the author's labour had not been expended in including rather than excluding many parts of the Orders which do not relate to ‘time.’ The question of ‘time,’ however, is of great importance and of very frequent recurrence in Chancery proceedings, whilst the resources of the most retentive memory cannot enable the practitioner to dispense with a tedious investigation on the subject, and this clearly arranged work will therefore be of great service to the Chancery lawyer.”

The *Law Times*, April 22, 1865, pp. 295, 296, says:—

“Already, since the publication of the General Orders of 1860 no less than twelve separate sets of new Orders have been issued. The confusion thence arising, the loss of time, and the unavoidable errors, through some oversight, are incalculable. Something should be done, and speedily too, to remedy this. There must be a reconsolidation, either according to order of time, or simply alphabetically, the subjects being classified in dictionary fashion.” Alluding to a letter from Mr. Braithwaite upon the subject, the writer further says—“Mr. Braithwaite hints that the impending assimilation of the practice of the Court of Chancery in Ireland with that of England, as proposed by a Bill now before Parliament, would afford an excellent opportunity for trying the experiment. It would be hard to thrust upon Ireland such an undigested mass of law as our present Chancery Orders. If we would do justice to Ireland, we must give her a code that will be at least intelligible and accessible. We cannot offer to the suitors there a volume of Consolidated Orders, altered, amended, and increased by twelve other sets of orders that are to be incorporated with them. We must reconsolidate the whole mass, and when doing this, would it not be as well also to recast the whole, and produce them in a shape that would make them readily accessible to the practitioners in Ireland, who will be compelled to undertake a new course of study. And so, while assisting the Irish lawyers, we shall also be serving ourselves. We recommend it to the consideration of the Lord Chancellor.”

It may be added that Ireland is waiting for England in this matter. The Rules of the Court of Chancery in Ireland are confessedly provisional only, and very incomplete. They would, however, be at once perfected if a new, consolidated edition of the English Orders were published. It is hoped, therefore, that, under all the circumstances, the Lord Chancellor may feel justified in no longer withholding from the profession the benefit of a new and improved issue of Consolidated General Orders in Chancery, even though that benefit should be enjoyed for a few years only.

#### THE JUDICATURE BILLS.

THE following is a copy of the communication from the Lord Chief Justice of England and other judges to the Lord Chancellor with respect to the High Court of Justice and Appellate Jurisdiction Bills:—

“Court of Queen’s Bench, May 13, 1870.

“My Lord,—I have the honour to inform your Lordship that in consequence of what you were reported to have said, in the recent debate in the House of Lords, as to having received from the judges, with a limited exception, no suggestions on the Bills relating to the High Court of Justice and High Court of Appeal, introduced into Parliament by your Lordship, the judges have met and given their careful attention to the Bills in question, and have embodied their views in the shape of resolutions.

“Before setting out these resolutions I must premise that, owing



to the shortness of the time, it being understood that the Bills would be proceeded with in the House of Lords on Monday next, the 16th instant, and also the great pressure of judicial business, the judges have only been able to deal with the more prominent and salient parts of these Bills, omitting mere matters of detail, as to some of which, relating to the High Court of Justice Bill, they may think it necessary to trouble your Lordship on a future occasion.

“The resolutions adopted by the judges are as follows :—

“(1.) That it appears to the judges that, while it is highly desirable that the distinction between Law and Equity now existing in respect of civil rights shall be done away with, and that in civil suits and actions one law shall be administered, it is essentially necessary, in order to prevent confusion in the future administration of justice, that, instead of a general enactment, such as is now contained in clause 13 of the High Court of Justice Bill, a careful collation of the Common Law and Equity Law having been first made, express provision shall be made as to what the law shall be in each particular instance ; or, if this course should be deemed impracticable, owing to the time it would require, that clauses should be carefully framed expressly stating the principles determined on by Parliament for the purpose in view.

“(2.) That while the Courts of Common Law should be required to administer the law as thus altered and settled in civil suits, it is wholly unnecessary, and on the contrary eminently undesirable, that their constitutions or peculiar jurisdictions in other matters should be in any way interfered with. That this applies to the peculiar jurisdiction of each of the three Courts, but more particularly to the prerogative and Crown jurisdiction of the Court of Queen’s Bench.”

“(3.) That the names and titles of the Courts and judges should remain the same as at present, any change herein being neither necessary nor desirable. That no power, therefore, should be conferred by the Bill to make any alteration in this respect.

“(4.) That while the judges are agreed that subordinate rules of procedure and rules of practice may be left to be settled hereafter, they are of opinion that, looking to the great and substantial difference which exists between the procedure of the Equity and the Common Law Courts, the more important matters of procedure ought to be considered and determined by Parliament, and should form part of the Bill.

“That herein they include, not only the system of pleading to be adopted, but also more especially the important question of trial by jury, and the examination of witnesses in open Court. Looking upon these questions as of vital importance to the administration of justice on the trial of disputed questions of fact in general, while they readily admit that there are certain classes of cases in which the Common Law form of trial is inappropriate, or at all events may be dispensed with, the judges submit that certain fixed guiding principles and rules should, after due consideration, be embodied in the Bill, instead of being left to be decided upon hereafter.

“That the power of making rules in respect of all matters of pro-

cedure not provided for by the Bill should be left to the Equity and Common Law judges, united in the High Court of Justice.

“That it is highly expedient and desirable that, after the first rules of procedure and practice shall have been framed and established, a power should be vested in the High Court of altering and modifying the procedure and practice from time to time as occasion may require, subject always to any orders and rules made for such purpose being laid before Parliament within a fixed time.

“(5.) That the judges are of opinion that the powers proposed to be given by clause 16 of the Bill to Ministers of the Crown, and to persons unnamed, are wholly unconstitutional, as being contrary to the principle that the judicature should be in all respects independent of the Executive; and they earnestly deprecate any power being vested in any person or body of persons, other than the High Court, to make or alter the law relating to the constitution, procedure, or practice of the Court.

“(6.) That with a view to the exercise of the powers referred to in paragraph 4, and of the powers originally proposed to be vested in the High Court of Justice, the judges willingly concur in the combination of the Courts of Common Law and Equity into one common Court. But if such powers are to be withheld and transferred elsewhere, as is proposed in the Bill as altered, the constituting of such a Court appears to them useless and unnecessary.

“The foregoing resolutions were agreed to unanimously by the assembled body of judges, being 16 in number, with the exception of the second, as to which Baron Bramwell and Mr. Justice Smith declined to express any opinion, while Mr. Justice Blackburn and Mr. Justice Hannen expressed their opinion as to the matters referred to in the second and third resolutions in the following terms:—

“‘We are not quite prepared to agree in these two resolutions, but we agree that no alteration in the names or titles, or in the constitution or peculiar jurisdictions of the Courts of Common Law, is required for the purpose of enabling these Courts to administer the law as proposed to be altered; and we are of opinion that it is very undesirable that any such alterations should be made, unless with carefully considered provisions (to be contained in the Act) to secure that the substance of what is now done by the peculiar jurisdiction of the Courts be not altered or destroyed by the change. This we think is not done in the present Bill.’

“Mr. Justice Willes, not having attended the meeting of the judges at which the foregoing resolutions were passed, transmitted his views in a written paper, which I forward herewith.

“I have further to state that as regards the appellate jurisdiction and the constitution of the High Court of Appeal, at a further meeting of fourteen of the judges, it was resolved by twelve judges, the two others—Mr. Justice Blackburn and Mr. Justice Smith—declining to express any opinion, that until the whole appellate jurisdiction, including that of the House of Lords and of the Judicial Committee of the Privy Council, shall be dealt with, the amount of arrears in the latter being of a most formidable description, it will be

impossible for the judges to offer any opinion or recommendation which shall be satisfactory to their minds.

“I have, &c.,

“(Signed)       ”

A. E. COCKBURN.

“The Right Hon. the Lord Chancellor.”

*Separate Memorandum of Mr. Justice Willes.*

It appears to the undersigned that the general scope of this measure is highly beneficial, as bringing the judges of all the Superior Courts together into one great body for the administration of justice. The Bill, as originally framed upon the recommendations of the Judicature Commission, took the best advantage of this proposed change, by not merely combining the Courts in name, but also conferring upon the judges powers (which like those given to the election judges by the Parliamentary Elections' Act, 1868, s. 25, ought to have the force of Statute) to work out the scheme by making rules of practice and procedure for the government of the Court and its branches. The result would have been a thorough administration of justice in each suit; so that a suitor, instead of being dismissed unheard because he had found his way into the wrong Court, would be referred to the appropriate division. Another, and by no means trifling, advantage would be, that wherever the distribution of business at present attributable to the peculiar functions of the several Courts, as for instance, Crown business to the Queen's Bench, registration and election to the Common Pleas, and revenue to the Exchequer, represents a convenient and economical division of labour, not involving conflict of jurisdiction, such distribution would for its obvious usefulness be retained. Details of this kind would assuredly be best arranged by the judges, with such assistance, under their control, as the additional temporary labour of framing rules might be found to require.

In its present shape, however, as amended, the Bill brings the Courts nominally indeed together, but places the judges at arm's length; for instead of authorising them to frame common rules for their united Court and its different divisions, the Bill subjects them all (more especially by clause 16), as to their procedure, order of business, times of sitting, and even the manner in which they are to give judgment, and the form in which their decisions are to be reported, to the control of the Privy Council, a course, it is believed, without constitutional precedent, and injurious to the independence and the efficiency of the judges. Save in the exercise of extraordinary powers of the Crown, such interposition of the Privy Council is unnecessary and impolitic. The representation of the Crown in the ordinary prerogative of justice is confided to the judges, subject only to the Legislature. Like remarks arise upon the High Court of Appeal Bill. Moreover, it does not provide for either abolishing or speeding and cheapening appeals to the House of Lords.

The Bills as originally presented seem to the undersigned substantially unobjectionable from the point of view of the Judicature Commission Report.

(Signed)

J. S. WILLES.

A NUMEROUSLY attended meeting of the Bar, at which several solicitors were present, was held at the Rooms of the Law Amendment Society, on Monday, May 2nd, George Mellish, Esq., Q.C., in the chair, to consider the provisions of the Bill.

Mr. G. W. Hastings opened the discussion at considerable length in favour of the principle of the Bill, and urged that the Attorney-General, if the feeling of the profession were in favour of the Bill, should convene a general meeting of the Bar, which, through a committee, might deliver its authoritative voice on the question.

Mr. Montagu Chambers, Q.C., M.P., Mr. Edwin Field, and Mr. Quain, Q.C., also addressed the meeting.

The Chairman said that there seemed to be an almost unanimous opinion as to the desirability of effecting the substance of the legal reforms recommended by the Judicature Commissioners, and the only question was as to the best and most efficient mode of carrying them out. He, for one, was clearly convinced of the great importance of the legal reforms recommended, and he believed that a system of procedure might be framed, which would be very much better than the present system of procedure in our Courts, both of Law and Equity, and which might make the procedure almost entirely similar in all Courts. The great difficulty, he could not help thinking, would be in framing the particulars of the system, and not in laying down the broad principles. If the Bill of the Lord Chancellor passed in its present form, the Committee of the Privy Council might make rules of procedure which might either revolutionize our whole system of trial, or rules which would leave matters exactly as they were at present. The real question at present was, whether the Committee of the Privy Council are fit to be trusted with so great a power and discretion. He confessed that he could not trust them with it. He could not trust the judges with it, and he had little more confidence in the Committee of the Privy Council. He could not think that calling judges, or ex-judges who had retired on pension, members of the Privy Council made them any better fitted for the duty. He could not help thinking that the real question as to the framing of a code of procedure was one of economy; the Government does not choose to go to the expense of getting a code of procedure framed as it ought to be done. It could not be done without the appointment of a paid commission for the purpose, and a certain expenditure of time. Of late years he had seen a good deal of the procedure in Scotch cases, in which there was a most perfect amalgamation of Law and Equity, which rendered their procedure much superior to ours, which proceeds on the supposition that all questions are to be determined by a jury, unless the parties consent to have them tried otherwise, however unfit they may be for trial in such a mode. In the Scotch



procedure each party told his own story in short sentences, instead of, as in our system of pleading, merely stating the legal results of the facts. In this way it is seen how much of the facts the parties are agreed upon; whereas with us, though a pleader may be told all the circumstances of the case—and if he had to tell the story of his client in the Scotch way, would be compelled to admit, perhaps, three-fourths of the facts alleged to exist by the other side—he nevertheless begins by traversing every allegation made by the other side. In the Scotch system the question between the parties naturally turned itself into the form of a special case, which, with us, can only be done by consent. There were, no doubt, some points in the Scotch system which were worse than our own, and a wrong issue is sometimes found after the trial to have been raised between the parties, and the whole thing comes to nothing; and in such simple actions as those for goods sold and delivered, and for libel, their proceedings are more dilatory than ours. He thought it quite possible to frame a system of procedure which would embody the good points without the defects of the Scotch system. In framing a system of procedure great care must be taken not to sacrifice the present generation for the benefit of posterity. It had been said by one of the preceding speakers that the system should be framed at once, and whatever required alteration might afterwards be altered; but in our excessive zeal to amalgamate Law and Equity, the common and ordinary actions and suits in both might be made more expensive and dilatory than they are at present. He had come to the conclusion that the whole gist of the matter lay in the framing of an entire system of procedure; and if, for that purpose, it were necessary to postpone the Bill of the Lord Chancellor, he was of opinion that it ought to be postponed; but he did not think it would be necessary to postpone the Bill for that purpose, because it was not intended to come into operation till 1871; and with a properly paid commission appointed to frame a code of procedure, and present it to Parliament before that time, he did not see why the Bill should not be passed this year. If Parliament approved the code of procedure thus framed, they might then appoint a body, whether composed of the judges or others, to alter, from time to time, any defects which might be found in the code to require amendment. But he doubted whether it would be safe to pass the Bill in its present form, a Bill which contained some sections unlike anything he had ever seen in an Act of Parliament before. He hoped he should not be thought to be less zealous than others in carrying out the great reforms proposed, but he thought it exceedingly important that they should be carried out properly, and that a system of procedure should be framed before the Act was finally passed.

Mr. Moffatt then moved—

“That this Society has seen with pleasure the introduction of the High Court of Justice Bill and the Appellate Jurisdiction Bill, and believes that in their principal features they embody great practical



reforms, and are calculated greatly to further the administration of justice."

Mr. Freeland seconded the motion, which was carried, and the proceedings concluded with a vote of thanks to the Chairman.

#### OPENING OF THE INNER TEMPLE HALL.

THE new Hall of the Inner Temple was formally opened on Saturday, May 14th, by the Princess Louisa, accompanied by the Prince Christian. Mr. P. A. Pickering, Q.C., the treasurer of the Temple, and the Benchers received the Royal guests, and Mrs. Pickering had the honour of presenting Her Royal Highness with a bouquet. When the Princess reached the library, the following address was read by the Treasurer :—

"May it please your Royal Highness,—We, Her Majesty's faithful subjects, the Treasurer and Masters of the Bench, the Barristers and Fellows of the Society of the Inner Temple, are anxious to express, with gracious permission of Her Majesty, and of your Royal Highness, our deep sense of the honour conferred upon our Society by Her Majesty's condescension in allowing herself to be thus represented on this auspicious occasion. It is now upwards of two centuries since this Society was honoured with such a mark of the favour of the Sovereign, and we most humbly embrace this opportunity of testifying our gratitude for this eminent proof of Her Majesty's gracious favour and regard for the profession of which we are members. The new hall, which Her Majesty has so graciously consented should be opened under her august patronage by your Royal Highness, is built on the site of that of the Knights Templars, which, with alterations made in it from time to time, had ever since the reign of Her Majesty's royal ancestor, King Edward III., been devoted to the service of the members of our profession. While we feel that this Society has always included in its body many of the servants of the Crown who have been in their time eminently distinguished, not only for their learning and integrity, but for their devoted loyalty and attachment to the throne, we may hope, in the same spirit and with the same devotion, which we most humbly but earnestly feel, to merit a continuance of Her Majesty's royal favour, which will at the same time be our boast and our reward. It is, we are well assured, only by a faithful performance of the trust reposed in us, and by our anxious and undeviating endeavour to uphold the independence and dignity of the Bar of England, we can do that to which our duty and our affections most ardently prompt us—give to the Throne its best and its firmest support. Since Her Majesty's happy accession to the Throne this country has indeed been blessed, under Her Majesty's auspices, with many amendments of the law, by which property and life have been rendered more secure, and we know that the same spirit which has hitherto thus so graciously consulted the welfare of her subjects will ever be ready to watch over their interests and to promote their prosperity. That Her Majesty may long reign over a happy, loyal, and devoted people is the most

fervent prayer which with all our hearts and feeling we offer up to Almighty God."

Her Royal Highness then read the following reply:—

"It gives me much pleasure to be permitted to represent the Queen, my dear mother, on an occasion of so much interest to the profession of which you are members. Her Majesty authorises me to express the cordial satisfaction with which she has learnt the completion of the beautiful building which you have erected on a site so rich in historical interest, and so long associated with the illustrious Bar of England. I thank you for the kindness with which you have received me here to-day, and I will not fail to communicate to the Queen your expression of loyal attachment to her throne and person."

After the *déjeûner*, which was splendidly served, three toasts were given—the Queen, the Princess Louisa, and Prince Christian, the junior Benchers. The Princess then arose and declared the hall open. Both on her arrival and on her departure, Her Royal Highness was loudly cheered.

On the Wednesday following, the Treasurer and Benchers of the Inner Temple entertained at dinner the Prince of Wales, the Prince Christian, the Lord Chancellor, Lord Granville, Lord Derby, Lord Westbury, Lord Chelmsford, the Speaker of the House of Commons, the Lord Chief Justice of England, the Judges in Equity and at Common Law, the Queen's Counsel, the Chancellor of the Exchequer, Mr. Cardwell, Mr. Goschen, Mr. Corry, Dr. Lushington, Sir David Dundas, and a very distinguished company, to celebrate the inauguration of the new hall.

#### THE LEGAL EDUCATION ASSOCIATION.

THIS Association has been formed with the following objects:—

(1.) The establishment of a law university for the education of students intended for the profession of the law.

(2.) The placing of the admission to both branches of the profession on the basis of a combined test of collegiate education and examination by a public board of examiners.

The Lord Chancellor and a number of the judges have already expressed their general approval of the above proposals.

The Association has also received from other distinguished lawyers assurances of hearty approval and co-operation; and the Committee of the Association believe that they have only to make known the objects which they have in view in order to obtain the approval and support of all who take an interest in the progress of the profession and in the advancement of a scientific study of the law in England.

#### GRAY'S INN.

THE grand day of Trinity Term was celebrated by the members of the Society on Friday, June 10. Among the guests were the Treasurers of Lincoln's Inn and the Inner Temple, Lord Chief Justice Bovill, the Lord Chief Baron, Vice-Chancellors Stuart and Malins, Mr. Justice Lush, Mr. Serjeant Payne, and Mr. Serjeant Sargood.

Previously to dinner the annual prize, amounting to 25*l.* (an exhibition founded by Mr. John Lee, Q.C., LL.D., late a Bencher of the Inn, deceased), for the best essay selected for this year upon the following subject:—"The Law of Distress in England, as compared with that of Prussia, France, and America, with suggestions for a revision," was awarded to Mr. John Procter, a student of the Society; and the subject of the essay for the ensuing year was announced to be as follows:—"The Feudal Tenures, their origin, their nature, and the causes which led to their abolition."

LORD JUSTICE GIFFARD.

THE legal profession, and the public who are accustomed to the Courts of Equity in Lincoln's Inn, will learn with regret the death of Lord Justice Giffard, which took place at his residence, 4, Princes' Gardens, Hyde Park, at half-past five o'clock, on the 13th ult. The learned judge, who both at the Bar and upon the Bench was universally respected by the members of his profession, had been ailing for some time previously, but as in the case of his late colleague Sir Charles Selwyn, such a fatally sudden termination to his illness had not been anticipated.

The Right Hon. Sir George Markham Giffard was a son of Admiral Giffard, by Susannah, daughter of Sir John Carter. He was born at the Admiral's official residence in Portsmouth dockyard in 1813, and was educated at Winchester, and at New College, Oxford, of which he became a Fellow. Subsequently he received the honour of B.C.L. from his University. He was called to the Bar at the Inner Temple in November, 1840, and afterwards became a Bencher of his Inn. Rather more than eighteen years after his call, and five years after his marriage to Maria, second daughter of Mr. Charles Pilgrim, of Kingsfield, Southampton, he received a silk gown, and, confining his attention chiefly to the Court of Vice-Chancellor Wood, he secured a large practice at the Equity Bar. When in the spring of 1868, Lord Cairns left the Court of Appeal for the Woolsack, and the present Lord Chancellor was appointed his successor, the vacant Vice-Chancellorship was offered to and accepted by Mr. Giffard, who, according to the usual practice, received the honour of knighthood. He remained a judge of first instance about nine months, for in December, 1868, the elevation of Lord Justice Wood to the woolsack, by the title of Lord Hatherley, created another vacancy in the Court of Appeal, and Sir G. M. Giffard then received the appointment of Lord Justice, with a seat in the Privy Council. He will be long remembered in Lincoln's Inn as a sound lawyer and a painstaking judge, and only a few days ago one of his decisions, by which the Duke of Newcastle was held to have been properly adjudicated a bankrupt, was upheld unanimously on an appeal to the House of Lords.

Sir George Giffard is the fourth Lord Justice for whom the bell of Lincoln's Inn has tolled in less than four years, Sir J. L. Knight Bruce having died in November, 1866, Sir G. J. Turner in July, 1867, and Sir C. J. Selwyn, in August, 1869. From the same

Court, in the beginning of 1868, Sir John Rolt was compelled to retire by an attack of paralysis, after only a six months' tenure of the post, to the deep regret of the Chancery suitors, who regarded Lord Cairns and Sir John Rolt as forming one of the strongest Courts of Appeal which had sat since the establishment of that tribunal.—*Law Times*.

### BAR EXAMINATIONS.

At the general examination of students of the Inns of Court, held at Lincoln's Inn Hall on May 21, 23, 24, and 25, 1870, the Council of Legal Education awarded to Mr. David Graham Barkley, student of Lincoln's Inn, a studentship of fifty guineas per annum, to continue for a period of three years; to Mr. Samuel Hall, student of the Middle Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years; to Mr. Archibald Brown, student of the Middle Temple, and Mr. Edward Tindall Atkinson, student of the Middle Temple, certificates of honour of the first class;—certificates that they have satisfactorily passed a public examination to Mr. Frank Matthew Betts, student of the Inner Temple; Mr. Horace James Browne, student of Lincoln's Inn; Mr. James Layton Brown, student of Lincoln's Inn (including Hindu Law, &c.); Mr. George Robert Elsmie, student of Lincoln's Inn (including Hindu Law, &c.); Mr. Frank John Fenton, student of the Inner Temple; Mr. Frederick John Fergusson, student of the Middle Temple (including Hindu Law, &c.); Mr. John Lawrence Gane, student of the Middle Temple; Mr. Henry Leland Harrison, student of Lincoln's Inn; Mr. Edgar Hutchinson Little, student of the Middle Temple (including Hindu Law, &c.); Mr. Elliot Macnaghten, student of Lincoln's Inn (including Hindu Law, &c.); Mr. Frederic Marshall, student of the Inner Temple; Mr. Alexander Robertson, student of Lincoln's Inn; Mr. John Douglas Sandford, student of the Inner Temple (including Hindu Law, &c.); Mr. William Walker, student of Lincoln's Inn; Mr. Edward John Watson, student of Lincoln's Inn; and Mr. Richard Thomas Wright, student of Lincoln's Inn.

On the subjects of the lectures and classes of the readers of the Inns of Court, held at Lincoln's Inn Hall, on the 30th June and the 1st and 2nd July, 1870, the Council of Legal Education awarded the following exhibitions to the undermentioned students, of the value of thirty guineas each, to endure for two years:—

*Constitutional Law and Legal History*.—Edwin Pears, Esq., student of the Middle Temple.

*Jurisprudence, Civil and International Law*.—Edward Walker Brandard Hance, Esq., student of the Middle Temple.

*Equity*.—Henry Charles Deane, Esq., student of Lincoln's Inn.

*The Common Law*.—Hugh Francis McDermott, Esq., student of the Inner Temple.

*The Law of Real Property*.—George Welby King, Esq., student of Gray's Inn.

The Council of Legal Education have also awarded the following exhibitions of the value of twenty guineas each, to endure for two years, but to merge on the acquisition of a superior exhibition:—

*Equity*.—Frederick George Carey, Esq., student of the Inner Temple.

*The Common Law*.—William Bennett Rickman, Esq., student of the Inner Temple.

*The Law of Real Property, &c.*—Samuel Lewis, Esq., student of the Middle Temple.

## CALLS TO THE BAR.

*Easter Term, 1870.*

**MIDDLE TEMPLE.**—Robert Anderson, Esq., B.A., Trinity College, Dublin, of the Irish Bar; Charles Delauney Turner Bravo, Esq., B.A., Trinity College, Oxford; Gerald Dyson Branson, Esq.; Reginald Brown, Esq., LL.B., Trinity Hall, Cambridge; George Crispe Whiteley, Esq., B.A., St. John's College, Cambridge; John Richard Davidson, Esq., M.A., University of Edinburgh, and Member of the Faculty of Advocates; William Norton, Esq., LL.B., Trinity Hall, Cambridge; Hon. Thomas Charles Agar-Robartes, M.A., Christ Church, Oxford; Thomas Morris Chester, Esq.; Peter Benemy, Esq.

**INNER TEMPLE.**—John Duncan Inverarity, Esq., B.A., LL.B., Cambridge; William Pitt Metcalf, Esq., B.A., Cambridge; John Warren Bakewell, Esq., Cambridge; James Cholmondeley Kaufmann, Esq., London; Charles Augustus Harold Black, Esq., B.A., Oxford; Edward Kirkpatrick Hall, Esq., B.A., Oxford; James Hume Dodgson, Esq., B.A., Cambridge; George Thomas Bailey Ormerod, Esq., B.A., Oxford; Gilbert George Kennedy, Esq., B.A., Cambridge; Oliver Henry Jones, Esq., B.A., Oxford; Philip Thomas Raleigh Hodges, Esq., LL.B., Cambridge; Samuel Barker, Esq., Oxford; Fairfax Rhodes, Esq., B.A., Cambridge; Cyril Flower, Esq., B.A., Cambridge; Henry Gordon Shee, Esq., Oxford; Francis Charles Gore, Esq.; Montagu Somes Pilcher, Esq., B.A., Cambridge; Edward Thomas Baldwin, Esq., B.A., Oxford; Edward Baldock Stone, Esq.; Charles William Turner, Esq., B.A., Cambridge.

**LINCOLN'S INN.**—Henry George Kennedy, Esq., B.A., Cambridge; Charles Austin, Esq., Fellow of St John's College, Oxford, M.A., and D.C.L.; Roger Gaskell, Esq., B.A., Cambridge; William John Court-hope, Esq., B.A., Oxford; Léopold George Gordon Robbins, Esq., B.A., Oxford; Henry Sutton, Esq., B.A., Cambridge; Warene Theodore Lionel Harries, Esq., B.A., Cambridge; Harry Arbuthnot Acworth, Esq.; William Alves Raikes, Esq., B.A. and S.C.L., Oxford; John Samuel Parkin, Esq., B.A., Cambridge.

*Trinity Term, 1870.*

**MIDDLE TEMPLE.**—George Lewis, Esq., holder of the studentship awarded by the Council of Legal Education in Michaelmas, 1869, and of a certificate of honour of the first class in Trinity, 1869; Samuel Hall, Esq., holder of the exhibition awarded by the Council of Legal Education in Trinity, 1870, B.A., Trinity College, Dublin; Edward Tindal Atkinson, Esq., holder of a certificate of honour of the first class awarded by the Council of Legal Education in Trinity, 1870; Howard Payn, Esq.; Haden Corser, Esq., B.A., Christ Church, Oxford; Ulick Ralph Burke, Esq., B.A., Trinity College, Dublin; Alfred David Bolton, Esq.; Eugene Wason, Esq., B.A., Wadham College, Oxford; James Wren Carlile, Esq., B.A., Balliol College, Oxford; Edgar Wight, Esq., B.A., Wadham College, Oxford; William Masterman, Esq., B.A., Wadham College, Oxford; Thomas Scarborough Johnson, Esq., M.A., Trinity Hall, Cambridge; Robert Lancaster, Esq., of Trinity College, Dublin; William Henry Hooper, Esq.; Henry Curtis Bennett, Esq.; Charles Horace Reily, Esq.; Lewis Arthur Thibaud, Esq., of the London University; Joseph Alun Jones, Esq.; John Charles Bigham, Esq., of the University of London; John Lawrence Gane, Esq.; Tarak Nath Palit, Esq.; Frederick Victor Dickens, Esq., of the London University; John Hutton Balfour Browne, Esq., of the University of London and of Edinburgh; Nicholas Arthur Forget, Esq.; Auguste Andre, Esq.; and Boys Firmin, Esq.



**INNER TEMPLE.**—John Robert Holland, Esq., M.A., Cambridge; William Thomas Trench, Esq., B.A., Cambridge; Ross Albert Andrews, Esq.; John Dawson, Esq., B.A., Cambridge; Henry John Hood, Esq., M.A., Oxford; Charles John Pearson, Esq., M.A., Oxford; Charles Lister Shand, Esq., B.A., Oxford; William Keogh, Esq., B.A., Dublin; William Lucius Selfe, Esq., B.A., Oxford; Douglas William Freshfield, Esq., M.A., Oxford; Charles Ernest Hensley, Esq., M.A., Oxford; Edward Stanley Hope, Esq., B.A., Oxford; George Hugh Charles Clifford, Esq.; Fitz Roy Paley Ashmore, Esq., B.A., Oxford; Kildare Christopher Robinson, Esq., B.A., Dublin; William Paget Bowman, Esq., B.A., Oxford; Frank Matthew Betts, Esq., B.A., Cambridge; George Hugh Norris, Esq., Oxford; Arthur Bennett Steward, Esq., B.A., S.C.L., Oxford; Edward Curtis Twiss, Esq., M.A., Oxford; John Humphreys, Esq.; William Chetwynd, Esq.; William Coward, Esq.; Charles Burgess, Nicholas Pearson, Esq.; John Winsland Burder, Esq., Oxford; Percival Francis Hoole, Esq., B.A., Cambridge; Charles Dickinson Field, Esq., M.A., LL.B., LL.D., Dublin; and John Douglas Sandford, Esq., B.A., Oxford.

**LINCOLN'S INN.**—David Graham Barkley, Esq., Queen's University, Ireland, M.A., Holder of Studentship, Trinity Term, 1870; Arthur Stanley Teape, Esq., B.A., Oxford; Hormasji Ardaseer Wadya, Esq., London University and Bombay University; David Ainsworth, Esq., University of London; Christopher James, Esq., B.A., Fellow Caius College, Cambridge; William Ansdell Leech, Esq., B.A., Cambridge; Harold Eugene Stansfeld, B.A., Cambridge; Horace James Browne, Esq., M.A., Cambridge; Richard Edward Jennings, Esq., B.A., Oxford; Alexander Burnes Bagnold, Esq., B.A., Oxford; Herbert John Lake, Esq., B.A., Oxford; Edward Watts-Russell, Esq., B.A., Oxford; William Thomas Fischer Agnew, Esq.; Thomas Prout Webb, Esq., B.A., Melbourne University; John Roland Phillips, Esq.; Frederick George Manley Wetherfield, Esq.; Richard Thomas Wright, Esq., B.A., Cambridge; John Richard Griffith, Esq., B.A., Oxford; Josiah Wilkinson, Esq., B.A., Oxford; Richard William Jorns, Esq.; Cecil Butler, Esq., B.A., Cambridge; Elliot Macnaghten, Esq.; and James Layton Brown, Esq.

## EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Easter Term, 1870.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Frederick George Hindle, Augustus Frederick Warr, Walter May Barton, John Joseph Faulkner, John Dickinson, John Proffitt, John Attenborough.

The Council of the Society have accordingly awarded the following prizes of books:—To Mr. Hindle, the prize of the Honourable Society of Clifford's Inn. To Mr. Warr, the prize of the Honourable Society of New Inn. To Mr. Barton, Mr. Faulkner, Mr. Dickinson, Mr. Proffitt, and Mr. Attenborough, prizes of the Incorporated Law Society.

The Examiners also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitle them to commendation:—James Frankland, William Thomas Hindmarsh, Leonard Wilson Taylor.

The Council have accordingly awarded them certificates of merit.

The number of candidates examined in this term was 106; of these, 94 passed, and 12 were postponed.

*Trinity Term, 1870.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Frederick Huxley, Henry Claud Lisle, Edward Cripps, jun., George Richard Wace, Apsley Petre Peter, Wotton Ward Isaacson, Edward Athow Field, B.A.

The Council of the Society have accordingly awarded the following prizes of books:—To Mr. Huxley, the prize of the Honourable Society of Clifford's Inn. To Mr. Lisle, the prize of the Honourable Society of New Inn. To Mr. Cripps, Mr. Wace, Mr. Peter, Mr. Isaacson, and Mr. Field, prizes of the Incorporated Law Society.

The Examiners also certified that the following candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitle them to commendation:—Godfrey Alexander Baker, B.A., William Martin Best, John Isaacs, jun., George Brewis McQueen, George Mason, William Rose Parrott, David Hunton Porrett, William Rogers, Lionel Nicholas Walford, Harry Woodward.

The Council have accordingly awarded them Certificates of Merit.

The Examiners further announced to the following candidate that his answers to the questions at the examination were highly satisfactory, and would have entitled him to a certificate of merit, if he had not been above the age of 26:—James Mason Allen.

The number of candidates examined in this Term was 165; of these, 153 passed, and 12 were postponed.

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APPOINTMENTS.

MR. JUSTICE BLACKBURN has received the degree of LL.D. from the University of Edinburgh.

Vice-Chancellor Sir William Milbourne James has been appointed a Lord Justice of Appeal in the room of the late Sir C. J. Selwyn; Mr. James Bacon, Vice-Chancellor, in succession to Sir. W. M. James.

Sir. W. M. James and Sir Barnes Peacock have been sworn in members of the Privy Council.

John Balguy, Barrister-at-Law, has been appointed Stipendiary Magistrate of the Potteries District. Mr. Gordon Whitbread, Judge of the Clerkenwell County Court, in succession to the late Mr. Bagshawe, Q.C. Mr. James Bryce, Professor of Civil Law in the University of Oxford. Mr. J. C. Davis, Stipendiary Magistrate for Sheffield. Sir George Young, President of a Commission, ordered to proceed to Demerara to inquire into the alleged illtreatment of Coolies. Mr. Isambard Brunel, Chancellor of the Diocese of Ely. W. E. J. Maynell, Recorder of Doncaster. Mr. J. J. Johnson, Q.C., Assistant Chairman of the West Sussex Quarter Sessions, in the place of Hon. J. J. Carnegie, elected Chairman. Professor Abdy, Recorder for the Borough of Bedford. Mr. H. W. Fisher, Private Secretary and Keeper of the Great Seal to the Prince of Wales. Mr. Henry Thurston Holland, Assistant Under-Secretary of State at the Colonial Office.

Mr. G. B. Mossman has been appointed Clerk to the Justices of East Morley Division of the West Riding, Yorkshire. Mr. Llewellyn Turner, Deputy Constable of Carnarvon Castle. Mr. J. C. Pinniger, Coroner for

East Berks. Mr. Symon Dunning, Solicitor to the Bishop of Chichester. Mr. W. J. S. Foster, Solicitor-Registrar of the Wells County Court. W. A. H. Boys, Solicitor, Coroner for Margate. Mr. John Blick, Clerk to the County Magistrates for Droitwich. Mr. G. E. Shoreland, Registrar of the Gravesend County Court. Mr. David Ward, Clerk to the Commissioners of Sewers of the Fens and Low Lands, Norfolk. Mr. Robert Dawburn, jun., Registrar of the March County Court. Mr. F. T. Southgate, Clerk to the Improvement Commissioners of Gravesend. Mr. Thomas Cousins, Admiralty Coroner and Solicitor at Portsmouth. W. H. C. Browning, Clerk to the Local Board of Health. Mr. Edward Jones, Clerk to the Commissioners of Prisons for the District of Anglesey. Mr. E. Beal, Deputy Clerk of the Peace for St. Albans. Mr. Bowker Weldon, Clerk to the Magistrates of Whittlesea. Mr. R. E. Pearce, Town Clerk of Southampton. Mr. J. C. Laycock, Clerk to the Magistrates of Huddersfield. Mr. Walter Hyde, Registrar to the Stockport County Court. Mr. W. Garrod, Clerk to the Commissioners of Taxes for the District of Blything. Mr. James Blacklock Lee, Registrar of the County Court at Halthwhistle. Mr. Edward Reddish, LL.B., Clerk to the Magistrates of the borough of Stockport.

IRELAND.—The Lord Chancellor of Ireland has been raised to the dignity of a peer of the United Kingdom, by the title of Baron O'Hagan of Tullahogue, in the county of Tyrone.

Trinity College, Dublin, has conferred the degree of LL.D. on Chief Baron Pigott, Baron Fitzgerald, and Mr. Justice Fitzgerald.

The Right Hon. Charles R. Barry, Q.C., has been appointed Her Majesty's Attorney-General for Ireland.

Mr. John M'Mahon has been appointed Crown Prosecutor in the county of Antrim, in the room of Mr. James Kernan, Q.C., who has been appointed Chief Judge in Madras.

AUSTRALIA.—Mr. J. F. Nolan has been appointed County Court Judge of Melbourne.

INDIA.—Mr. L. P. D. Broughton has been appointed Administrator-General of Bengal in the place of the late Mr. Hogg. Mr. Joseph Graham, Acting Advocate-General at Calcutta, member of the Legislative Council of Bengal. Mr. Charles Sanderson, Solicitor-Registrar of the Archdeaconry of Calcutta. Mr. J. P. Green, Puisne Judge of the High Court of Bombay during the absence of Sir Charles Sargent. Mr. T. B. Ferguson, Sealer of the Court of Relief of Insolvent Debtors at Bombay. Mr. Charles Peile, Government Solicitor and Public Prosecutor of the Presidency of Bombay. Mr. James Westborne, Superintendent and Remembrancer of Legal Affairs in Bengal. Mr. E. A. Turner, to officiate as Chief Justice at Allahabad during the absence of Sir Walter Margan. Mr. C. J. Wilkinson, Official Trustee of Bengal and Receiver of the High Court in the room of the late Mr. Hogg.

Sir Richard Couch was sworn in on April 26 at the appellate side of the High Court as Chief Justice of the High Court of Judicature at Calcutta.

MAURITIUS.—Mr. J. L. Colin has been appointed Procureur and Advocate-General.

TASMANIA.—Sir Francis Smith has been appointed Chief Justice of the Colony in the place of Sir Valentine Fleming, retired. Mr. William L. Dobson, Puisne Judge of the Supreme Court of Hobart Town, in the place of Sir F. Smith, promoted.

## PHOTOGRAPHS OF THE JUDGES.

SUCH of our readers as have seen Dr. Wallick's photographs of eminent scientific men of the day, will be gratified to learn that it is his intention to bring out a similar set of photographs of judges and eminent members of the Bar. If the proposed series of photographic portraiture be distinguished by the same accuracy of likeness and delicate disposal of light and shade as that which has just appeared, we have no doubt of its being very favourably received, both by the profession and the public.

MESSRS. MATHERSON & Co. have given a prize of £10, to promote the study of the Law in connection with the evening classes at King's College, London.

PROFESSOR CUTLER will deliver a public lecture at King's College, on Wednesday evening, October 12, on the "Naturalization Act, 1869."

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## Neurology.

### *April.*

- 3rd. LUSH, R. C., Esq., Barrister-at-Law, aged 28.  
 21st. PAYNE, Sir C. G., Bart., Barrister-at-Law, aged 77.  
 21st. WALKER, Baines, Esq., Solicitor, aged 37.  
 22nd. WILLIAMSON, J. W., Esq., Barrister-at-Law, aged 79.  
 25th. KNIGHT, J. T., Esq., formerly Attorney-General of Island of Tasmania.  
 26th. MOSSMAN, G. R., Esq., Solicitor.  
 30th. READE, William, Esq., Barrister-at-Law, aged 65.

### *May.*

- 1st. LEATHERS, C. E. S., Esq., Solicitor.  
 2nd. CLAPTON, Jeremiah, Esq., Solicitor, aged 75.  
 2nd. GIBSON, William A., Esq., Solicitor, aged 29.  
 6th. WILDES, H. Atkinson, Esq., Solicitor, aged 78.  
 12th. JONES, J. Watkins, Esq., Solicitor, aged 41.  
 16th. LAY, James, Esq., Solicitor, aged 57.  
 16th. BAGSHAW, H. R., Esq., Q.C., County Court Judge, aged 70.  
 17th. SWAINSON, William, Esq., Solicitor, aged 60.  
 18th. FERNS, G. E., Esq., Solicitor, aged 49.  
 19th. POWNALL, R. E., Esq., aged 81.  
 20th. SHARPE, William, Esq., Solicitor, aged 65.  
 20th. VIVIAN, J. E., Esq., Barrister-at-Law, aged 83.  
 20th. SOUTHGATE, Francis, Esq., Solicitor, aged 78.  
 22nd. BARNSIDE, W. Stanford, Esq., Barrister-at-Law, aged 79.  
 24th. NORRIS, William, Esq., Solicitor, aged 78.  
 25th. JEANNERET, F. H., Esq., Solicitor, aged 46.  
 27th. LAING, Samuel, Esq., Barrister-at-Law, aged 26.  
 27th. ENKLATER, John, Esq., Solicitor, aged 53.  
 28th. WARD, John, Esq., Solicitor, aged 89.





